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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

L. O. WARD d/b/a
L. O. WARD OIL AND GAS OPERATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 598 F.2d 1187. The opinion of the district court (App. C, *infra*, 22a-35a) is reported at 423 F. Supp. 1352.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 20a-21a) was entered on May 10, 1979. On August 2, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 7, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a proceeding pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act (the FWPCA), 33 U.S.C. 1321(b)(6), for the assessment of a "civil penalty" against the individual owner or operator of a facility from which oil was discharged in violation of Section 311(b)(3) of the FWPCA, 33 U.S.C. 1321(b)(3), is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment to the Constitution in which the government is barred from using any information about the discharge that is required, under pain of criminal sanctions, to be reported to the government by the individual pursuant to Section 311(b)(5) of the FWPCA, 33 U.S.C. 1321(b)(5).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1321, as in effect at the time the present case arose, is reproduced in Appendix D, *infra*, 36a-57a. Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467, but these amendments have no direct bearing on the present case.

STATEMENT

1. The Federal Water Pollution Control Act—commonly referred to as the Clean Water Act—sets forth a comprehensive statutory framework designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). As part of this overall plan, Section 311 regulates the discharge of oil and hazardous substances into navigable waters in fulfillment of the congressional policy that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States * * *." Section 311(b)(1).

Congress employed a number of different procedures to accomplish this "no discharge" objective. Section 311(b)(3), as in effect when this case arose, prohibited the discharge into the navigable waters of the United States or upon adjoining shorelines of oil or hazardous substances in quantities determined by the President to be "harmful." [1] The President delegated the function of determining the amount of substances that are "harmful" under this provision to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 11735, § 1, 3 C.F.R. 793 (1971-1975 Compilation).

The President is authorized by Section 311(c)(1) to act to remove or to arrange for the removal of any oil or hazardous substance discharged into or upon the navigable waters of the United States or adjoining shorelines, unless he determines that the owner or operator of the vessel or facility from which the substance was discharged will properly remove the substance. These clean-up costs are paid out of a special revolving fund established in the Treasury by Section 311(k). Congress has from time to time appropriated money for the fund, but the fund is intended to be replenished by recoveries from those responsible for prohibited discharges. Section 311(k).

The owner or operator of the vessel or facility from which oil or a hazardous substance is discharged in

[1] Section 311(b)(3) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as *may* be harmful" (emphasis added), as determined by the President.

violation of Section 311(b)(3) is liable to the United States for the actual costs incurred by the government in clean-up operations, except where the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party. Section 311(f). Funds recovered pursuant to this provision are, as mentioned above, deposited in the revolving fund established under Section 311(k).

Section 311(b)(5) of the FWPCA requires any "person in charge" of a vessel or facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) to "immediately notify the appropriate agency of the United States Government of such discharge." This notification enables the federal government to ensure that clean-up and other remedial measures are taken promptly. Failure to notify the appropriate agency immediately is a criminal offense punishable by a fine of up to $10,000 and imprisonment for one year. Section 311(b)(5) provides, however: "Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

Section 311(b)(6), as it read at the time of the discharge involved in this case, provided that the "owner or operator" of a facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard

is operating in an amount not to exceed $5,000 for each offense. In determining the amount of the penalty or any settlement thereof, the Secretary is to take into account "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." [2]

Civil penalties recovered in proceedings brought under Section 311(b)(6) are paid into the revolving

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[2] Section 311(b)(6) was amended by Section 58(a)(7) and (8) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1594, to provide *inter alia*, that the "person in charge" of a facility is liable for a civil penalty in addition to the "owner [or] operator" of the facility.

Section 311(b)(6) was further amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to permit the Administrator of EPA to bring an action directly in district court to recover a civil penalty of up to $50,000 against the owner, operator, or person in charge of a vessel or facility from which a substance is dicharged in violation of Section 311(b)(3). The amount of the penalty is to be determined by the same three factors utilized by the Coast Guard in assessing a penalty administratively, as well as the "standard of care manifested" and efforts to "minimize or mitigate the effects of such discharge." The penalty may be in an amount of up to $250,000 if the Administrator can show willful negligence or misconduct on the part of the defendant. This provision for the assessment of a civil penalty by an action in district court was intended to be utilized in the case of more serious discharges, and it cannot be utilized if the Coast Guard has already assessed a penalty administratively. EPA recently issued regulations and entered into a memorandum of understanding with the Coast Guard governing the assessment of civil fines in district court. 44 Fed. Reg. 50766, 50771, 50779, 50785 (1979).

fund established by Section 311(k), along with recoveries under Section 311(f) from owners or operators of the costs incurred by the United States in cleaning up discharges. Thus, the collection of civil penalties in all cases helps defray the cost of cleaning up those oil spills for which the government's clean-up costs are not otherwise recoverable—*e.g.*, where spills are not reported or cannot be traced to a particular source, where spills are caused by an act of God, an act of war, or negligence on the part of the United States, where the owner or operator of the facility at which the discharge occurred is insolvent or where the clean-up costs exceed the limitations on liability established in Section 311(f). (See App. *infra*, 9a.)

2. On or about March 23, 1975, oil escaped from an oil retention pit at a drilling facility on premises leased by L. O. Ward, d/b/a L. O. Ward Oil and Gas Operations, near the City of Enid, Oklahoma (App., *infra*, 2a, 23a; Tr. 47-48). On March 25, a sanitarian with the Oklahoma Department of Health on a routine inspection of a landfill near Ward's property observed that oil had seeped from the retention pit, down a gully, and into Boggie Creek (Tr. 47-51), a tributary of the Arkansas River system (App., *infra*, 2a). The Arkansas River is navigable in fact, and Boggie Creek is therefore also a navigable water of the United States for purposes of the FWPCA. 33 U.S.C. 1362(7) (see App., *infra*, 2a n.1, citing *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974)).

The sanitarian testified at trial that he saw oil on the surface of the creek (Tr. 50). Because the oil

was in a visible quantity, the discharge constituted a "harmful" quantity of oil within the meaning of Section 311(b)(3) and implementing regulations of EPA, 40 C.F.R. 110.3. One of Ward's employees testified at trial that he received a telephone call from the Oklahoma Department of Health on March 25, 1975, notifying him of the discharge (Tr. 77). On April 2, 1975, Ward notified the regional office of EPA—the appropriate agency for purposes of Section 311(b)(5)[3]—that a discharge of oil had taken place.[4]

[3] The President designated the Coast Guard as the "appropriate agency" for purposes of receiving the notice of a discharge required by Section 311(b)(5). Exec. Order No. 11735, *supra*, Section 7. Current Coast Guard regulations provide that such notification may be given, *inter alia*, to the government official predesignated as the On-Scene Coordinator for the geographic region in which the discharge occurs. 33 C.F.R. 153.203(a)(2). The Administrator of EPA is responsible for furnishing the On-Scene Coordinator for inland waters, 33 C.F.R. 153.103(p), and EPA is therefore an appropriate agency to receive notification under Section 311(b)(5). Notice to EPA was also appropriate at the time of the discharge in this case. 33 C.F.R. 153.203(a); 33 C.F.R. 153.105 (1975). *Cf. United States* v. *Kennecott Copper Corp.*, 523 F.2d 821, 824 (9th Cir. 1975).

[4] Ward notified EPA eight days after one of his employees was informed of the discharge by an official of the Oklahoma Department of Health. This notification would not appear to have been "immediate," as Section 311(b)(5) requires. See *United States* v. *Kennecott Copper Corp., supra; United States* v. *Ashland Oil & Transp. Co., supra.* The government argued in the court of appeals that because Ward did not notify the appropriate agency immediately, he could not take advantage of the statutory grant of use and derivative use immunity in Section 311(b)(5), which was intended to implement the Fifth Amendment privilege against self-incrimination. We do not present that issue in this petition.

Ward submitted a more complete written report of the discharge to EPA on June 25, 1975 (App., *infra*, 23a) as required by Section 308(a)(A) of the FWPCA, 33 U.S.C. 1318(a)(A).[5]

On August 15, 1975, EPA notified the Coast Guard that the oil discharge in question apparently violated Section 311(b)(3) and recommended a civil penalty in the range of $500 to $1,000, based on the statutory standards (App., *infra*, 3a). There is no indication in the record that the Coast Guard received any notice of the discharge from any other source. On December 19, 1975, after notice and opportunity for a hearing, the Coast Guard assessed a civil penalty against Ward in the amount of $500 (*ibid.*). He filed an administrative appeal from this ruling, contending that the en-

[5] Section 308(a)(A) authorizes the Administrator of EPA to require the owner or operator of any point source of effluents to make such reports, maintain such records, and provide such other information as the Administrator may require in order to enable him to develop effluent or other limitations, determine whether a person has violated existing limitations or standards, or to carry out other provisions of the FWPCA.

EPA regulations, which were in effect at the time of the discharge involved in this case, require the owner or operator of a facility at which there has been a discharge of more than 1000 gallons of oil or two or more discharges of oil in "harmful" quantities to submit a complete report of the discharge to the Regional Administrator within 60 days of the discharge. 40 C.F.R. 112.4. The discharge involved here was a "harmful" quantity of oil. 40 C.F.R. 110.3. There are civil and criminal penalties for the failure to file a report as required under these regulations. 33 U.S.C. 1319(c) and (d). EPA had requested Ward to submit the written report and advised him that failure to do so could result in imposition of criminal sanctions.

forcement scheme violated his Fifth Amendment privilege against self-incrimination. The administrative appeal was denied.

On April 13, 1976, Ward filed suit in the United States District Court for the Western District of Oklahoma against the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA to enjoin enforcement of Section 311 (b) (5) and (6) and collection of the administratively assessed penalty (App., *infra*, 3a). Ward moved to convene a three-judge court pursuant to 28 U.S.C. 2282.[6] On June 4, 1976, the United States filed a separate action in district court to collect the unpaid penalty (*ibid.*). The court denied Ward's motion to convene a three-judge court on the ground that no substantial challenge to the constitutionality of the statute was presented (App., *infra*, 23a n.2) and ordered the two cases consolidated (*id.* at 24a). The court denied Ward's motion for summary judgment, in which he raised his Fifth Amendment claim (App., *infra*, 24a-31a, 35a). The case was then tried to a jury, which found that oil from Ward's facility did spill into Boggie Creek. After considering the statutory factors to be considered in determining the amount of a penalty, the court reduced the penalty to $250 (App., *infra*, 4a).

The court of appeals reversed, holding that the civil penalty proceeding in Section 311(b)(6) is criminal

[6] 22 U.S.C. 2282 was repealed by Section 2 of Pub. L. No. 94-381, 90 Stat. 1119 (August 12, 1976), but, under Section 7 of that act, it remained in effect with respect to cases previously filed.

in nature and that notification given to the appropriate agency as required by Section 311(b)(5) could not be used in determining either liability for or the amount of the civil penalty assessed under Section 311(b)(6). The court acknowledged (App., *infra*, 9a) that payment of the civil penalties into the revolving fund to defray the costs of administration and enforcement of Section 311 and of cleaning up oil spills where those costs are not otherwise recoverable indicates the "remedial" character of the civil penalty provision. But, in concluding that the civil penalty provision is nevertheless penal or criminal in nature, the court relied upon the automatic assessment of a civil penalty without regard to fault, which it viewed as indicative of a punitive or retributive purpose, and implementing instructions issued by the Commandant of the Coast Guard, which the court believed reflected a similar purpose. The court also attached importance to the fact that the conduct involved—a discharge into navigable waters—may already be a crime under Sections 13 and 16 of the Rivers and Harbors Act, 33 U.S.C. 407 and 411 (App., *infra*, 13a, 15a-16a, citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), and what it viewed as the possibly excessive amount of the penalty in relation to the remedial purposes ascribed to it where the penalty is assessed without regard to fault (*id.* at 16a-17a).

The court did not strike down either the self-reporting requirement in Section 311(b)(5) or the civil penalty provision in Section 311(b)(6); it in-

stead fashioned the use and derivative use immunity described above.[7]

REASONS FOR GRANTING THE PETITION

1. The decision by the court of appeals that a civil penalty proceeding under Section 311(b)(6) is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment could disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act. The most obvious impact would be on the ability of the Coast Guard to bring civil penalty actions against individual owners and operators of vessels and on-shore and off-shore facilities.

In calendar year 1978, there were 14,741 discharges of oil brought to the attention of the Coast Guard. The Coast Guard estimates that about 8,000 of these discharges were traced to a particular vessel or facility. Because the Coast Guard assesses at least some

[7] The court of appeals also concluded (App., *infra*, 4a-6a) that the district court had properly declined to convene a three-judge court pursuant to 28 U.S.C. 2282 in the action brought by Ward, noting that a judgment for Ward in the district court would not have restrained enforcement or operation of the FWPCA because the self-reporting system would have remained intact and civil penalties could still have been assessed if the government did not prove its case on the basis of information derived from a report submitted as required by Section 311(b)(5). See also *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). The court remanded this action to the district court with instructions to dismiss (App., *infra*, 19a, 21a). The Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA therefore do not seek review of the court of appeals judgment in that case.

penalty in all instances of proven violations, there were approximately 8,000 civil penalty cases brought in 1978. A sample of 100 civil penalty cases in each of the twelve Coast Guard districts revealed an individual owner or operator in almost a fifth of the cases.[8] This suggests that there were more than 1,400 civil penalty cases against individual owners and operators during that year.

Under the Tenth Circuit's view that these proceedings are "criminal cases" for purposes of the Fifth Amendment privilege, the government would of course be barred from compelling the individuals' testimony in any judicial proceedings to collect the penalty.[9] Moreover, the sample just mentioned indicates that about one quarter of the civil penalty cases against individual owners and operators involve self-reporting of the discharge. Thus, based on 1978 figures, the Coast Guard would be barred under the Tenth Cir-

[8] Corporations do not have a Fifth Amendment privilege against compulsory self-incrimination, see, *e.g.*, *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 71 (1974), and therefore would not be directly affected by the Tenth Circuit's constitutional holding in this case.

[9] The vast majority of civil penalties assessed at the administrative level are paid upon assessment and therefore do not require judicial proceedings for their collection, no doubt because the absence of any defenses to liability if the discharge can be traced to the particular vessel or facility creates a strong disincentive to incur additional litigation expenses. The Tenth Circuit's holding could induce increased litigation because of the possibility that civil penalty liability could be avoided altogether if the government could not establish an independent source of information about the discharge.

cuit's reasoning from making any use or derivative use of that information in some 350 civil penalty proceedings each year.[10] Coast Guard data do not indicate how many of these discharges could not have been discovered or linked to the particular individual's vessel or facility in the absence of self-reporting, but the number is no doubt significant.

What is more, even where the Coast Guard received independent evidence of the occurrence of a discharge or independent evidence tracing a discharge to a particular vessel or facility, it and other federal agencies would, under the rationale of the court of appeals' decision in this case, be put to the considerable burden of ensuring and proving that the government made no use or derivative use of the information in developing the civil penalty case. *Kastigar* v. *United States*, 406 U.S. 441, 460-461 (1972). This burden would presumably extend to proving not only that the government did not make use of the notification of the discharge under Section 311(b)(5) and information obtained from that notification, but also that it did not utilize the more complete information furnished by the individual owner or operator of a facility required, under pain of criminal or civil penalties,

[10] If a proceeding under Section 311(b)(6) were held to be a criminal case for purposes of the Fifth Amendment privilege, a further question would be presented as to what, if any, information required to be furnished by an individual under Sections 308(a)(A) and 311(b)(5) could, consistently with the Fifth Amendment, be used against the individual in the proceeding. See *California* v. *Byers*, 402 U.S. 424 (1971). We do not raise this issue in the present petition.

to be filed under Section 308(a)(A) of the FWPCA. See note 5, *supra*.

The data discussed above only pertain to civil penalty cases based on prohibited discharges of oil. Neither EPA nor the Coast Guard has yet begun to enforce the prohibitions in Section 311(b)(3) against the discharge of hazardous substances. However, on August 29, 1979, EPA published regulations governing the discharge of hazardous substances and the procedures to be followed in assessing civil penalties against those responsible for such discharges. 44 Fed. Reg. 50766 (1979). A memorandum of understanding between EPA and the Coast Guard regarding the assessment of civil penalties by the two agencies in hazardous substance cases was published on the same date. *Id.* at 50785. An as yet undetermined number of additional civil penalty cases involving the discharge of hazardous substances may therefore be anticipated in the future, some of which will surely raise the same constitutional issue presented in this case.

The implications of the decision of the court of appeals are broader still in view of the 1977 amendments to Section 311(b)(6) rendering the "person in charge" of a facility or vessel liable for a civil penalty along with the owner or operator. See note 2, *supra*. Although the Coast Guard has thus far applied this amendment principally to the masters of foreign vessels that may not be subject to the jurisdiction of the United States, the language of the amendment clearly has a potential application to the "person in charge" of any off-shore or on-shore facility as well.

Thus, the Tenth Circuit's decision could have an impact even in cases involving corporately owned and operated vessels and facilities.

To the extent that assessment of civil penalties against individual owners, operators, or persons in charge is rendered impossible by the Tenth Circuit's decision because notification of the spill was obtained solely from the individual concerned, the revolving fund established to cover clean-up and administrative costs is deprived of a source of funds intended by the Congress to sustain it. In addition, if the government were forced to establish independent evidence of the occurrence of a discharge or its source at a particular vessel or facility, the additional expense incurred would create a drain on the revolving fund, from which the costs of administering and enforcing Section 311 are paid.

Aside from the monetary loss, the obstacles to assessment of civil penalties against individual owners, operators, or persons in charge of facilities and vessels would remove an important incentive to exercise the high standard of care required by the Act, particularly in circumstances involving the potential for relatively small and therefore often undetectable spills, thereby frustrating the accomplishment of Congress' remedial purposes in providing for assessment of civil penalties. This frustration of congressional purpose would be especially pronounced if, as seems likely, the Tenth Circuit's decision were to preclude EPA from recovering a larger civil penalty of up to $50,000 ($250,000 in the case of willful negligence or

misconduct) against an individual owner, operator, or person in charge who had notified the appropriate agency of a more serious discharge warranting assessment of this larger penalty pursuant to the 1978 amendments to Section 311(b)(6). See note 2, *supra*.

2. The Tenth Circuit's holding that a proceeding to assess a civil penalty under Section 311(b)(6) is a "criminal case" for purposes of the Fifth Amendment privilege against compulsory self-incrimination is inconsistent with prior decisions of this Court. The Court has viewed the question whether a given proceeding is criminal for purposes of constitutional protections as one of statutory interpretation. See, e.g., *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 399, 401-402 (1938). Cf. *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 16-17. "When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word," *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974), at least if the measure of recovery is not so excessive as to transform what was intended to be a civil penalty into a criminal penalty, *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 237. It is clear that Section 311(b)(6) was intended by the Congress to be civil in nature. The penalty is expressly denominated "civil," and the procedure for administrative assessment is civil.

To be sure, there is language in some cases indicating that the Fifth Amendment privilege against compulsory self-incrimination is broader than other constitutional rights and that the privilege may therefore apply in some forfeiture or penalty proceedings that are nominally civil. See, *e.g.*, *United States* v. *United States Coin & Currency*, 401 U.S. 715, 718 (1971); *United States* v. *Regan*, 232 U.S. 37, 50 (1914); *Hepner* v. *United States*, 213 U.S. 103 (1909); *Boyd* v. *United States*, 116 U.S. 616, 634 (1886). However, the Court has made clear that this broader reach of the Fifth Amendment privilege applies only in the case of civil penalties that are intended to be punitive rather than remedial in nature. *Helvering* v. *Mitchell*, 303 U.S. 391, 399-400 & n.3, 404 & n.12 (1938). See, *e.g.*, *United States* v. *United States Coin & Currency*, *supra*, 401 U.S. at 721-722; *Boyd* v. *United States*, *supra*, 116 U.S. at 634.

The civil penalty provisions in Section 311(b)(6) are remedial, not punitive, under this analysis. The civil penalty may be viewed as compensation to the United States for the ecological harm resulting from a spill. *United States* v. *W.B. Enterprises, Inc.*, 378 F. Supp. 420, 422-423 (S.D. N.Y. 1974). The civil penalty also furthers the FWPCA's goal of pollution-free water by imposing a type of absolute or enterprise liability on those who engage in activities creating a risk of discharge in order to fund the administration and enforcement of various provisions of Section 311. *United States* v. *Marathon Pipe Line*

Co., 589 F.2d 1305, 1309 (7th Cir. 1978). Payment of forfeitures and penalties into a fund to reimburse the government for its enforcement expenses has been held by the Court to be a remedial purpose. *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 237. See *United States* v. *Eureka Pipeline Co.*, 401 F. Supp. 934, 940 (N.D. W.Va. 1975).

3. The conclusion by the court of appeals that a proceeding for the assessment of penalties under Section 311(b)(6) is a "criminal case" within the meaning of the Self-Incrimination Clause is also inconsistent with the conclusion reached by a number of courts that such a proceeding is not "criminal" for purposes of the statutory immunity provision in Section 311(b)(5), which was designed to protect the Fifth Amendment privilege. See, *e.g.*, *United States* v. *Allied Towing Corp.*, 578 F.2d 978 (4th Cir. 1978); *United States* v. *Le Beouf Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977); *Apex Oil Co.* v. *United States*, 530 F.2d 1291, 1293 n.7 (8th Cir. 1976), cert. denied 429 U.S. 827 (1977); *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977), aff'd *sub. nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978).[11] It is true that these cases involved corporate defendants and that there were expressions in several of the opinions that a closer scrutiny may be warranted

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[11] The Tenth Circuit in the present case also stated (App., *infra*, 18a n.7) that its constitutional holding with respect to individual defendants would not preclude the use of the notification of a discharge where a corporate defendant is involved.

in the case of an individual defendant. *United States* v. *Allied Towing Corp., supra,* 578 F.2d at 980 (concurring opinion); *United States* v. *Le Beouf Bros. Towing Co., supra,* 537 F.2d at 151-152. Nevertheless, the holding in these cases that Congress did not regard a proceeding under Section 311(b)(6) to be criminal in nature is inconsistent with the reasoning of the Tenth Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Acting Assistant Attorney General

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SEPTEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1952

[Filed May 10, 1979]

L. O. WARD, APPELLANT

vs.

WILLIAM G. COLEMAN, JR., Individually, and as Secretary of Transportation of the United States of America; RUSSELL E. TRAIN, Individually, and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, Individually, and as Commandant United States Coast Guard, United States of America, APPELLEES

Appeal from the United States District Court for the Western District of Oklahoma

(D.C. Nos. 76-0303-E,
76-0456-E)

L. O. Ward d/b/a
L. O. WARD OIL AND GAS OPERATORS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Submitted: March 14, 1979

Before HOLLOWAY, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

L.O. Ward (Ward) appeals from the judgment in an action seeking recovery of Civil penalties assessed against him by the United States Coast Guard (Coast Guard) pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, (FWPCA).

Ward is the owner and operator of L.O. Ward Oil and Gas Operations—a sole proprietorship. On March 23, 1975, oil overflowed from a drilling site located in Garfield County, Oklahoma, into Boggie Creek, which is a distant tributary of the Arkansas River.[1]

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[1] The Arkanas River is navigable in fact. Therefore, Boggie Creek, as its tributary, is also a navigable water of the United States for purposes of the FWPCA. *See:* 33 U.S.C. 1362(7); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974).

After discovering the spill, Ward immediately began clean-up operations in the area. Ward then submitted a report of the spill to the Environmental Protection Agency. The EPA forwarded the report to the Coast Guard [2] requesting that an assessment of civil penalties be made against Ward in accordance with 33 U.S.C. § 1321(b)(6). On December 19, 1975, following notice and opportunity to be heard, the Coast Guard assessed a $500.00 penalty against Ward for discharging oil into navigable waters in violation of 33 U.S.C. § 1321(b)(3).

Ward refused to pay the assessed penalty. He appealed the administrative ruling, contending that the enforcement scheme of § 1321 violated his Fifth Amendment privilege against self-incrimination. The administrative appeal was denied. On April 13, 1976, Ward filed suit in the District Court to enjoin enforcement of the administratively assessed penalty. At the same time, Ward moved to convene a three-judge court pursuant to 28 U.S.C. § 2282 (repealed August 12, 1976).

On June 4, 1976, the United States filed a separate action in District Court to collect the unpaid penalty and moved to consolidate the two cases for trial. The

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[2] § 1321(b)(5) of 33 U.S.C. requires any person in charge of an on-shore facility to immediately notify the Coast Guard as soon as he has knowledge of any discharge of oil or other hazardous substance into the navigable waters of the United States. Failure to immediately report such a discharge subjects the offending party to criminal sanctions of not more than $10,000 or imprisonment for not more than one year, or both.

District Court denied Ward's motion to convene a three-judge court and ordered the cases consolidated. Ward subsequently moved for summary judgment in both cases contending that his compulsory report under § 1321(b)(5) resulted in the automatic imposition of punitive sanctions under § 1321(b)(6) and therefore violated his privilege against self-incrimination.

In a memorandum opinion and order dated December 22, 1976, the District Court denied the motion for summary judgment in its entirety. Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okl. 1976). The case was thereafter tried to a jury, which resulted in a verdict in favor of the Government and the assessment of a penalty against Ward in the reduced amount of $250.

On appeal, Ward contends that: (1) the trial court erred in refusing to convene a three-judge district court, and (2) the FWPCA's enforcement scheme violates the self-incrimination clause of the Fifth Amendment to the United States Constitution.

I.

Before turning to Ward's challenge based upon the self-incrimination clause of the Fifth Amendment, we must determine whether the trial court erred in refusing to convene a three-judge district court.

28 U.S.C. § 2282 requires that a three-judge court be convened in any action where a preliminary or permanent injunction is sought to restrain "the enforcement, operation or execution of any Act of Con-

gress for repugnance to the Constitution of the United States . . . ." [3] The purpose of § 2282 is "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by the issuance of a broad injunction order." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963). If § 2282 applies, we must vacate the judgment and remand for consideration by a three-judge panel. *See*: Federal Housing Administration v. The Darlington, Inc., 352 U.S. 977 (1957).

It is axiomatic that before § 2282 comes into play, an injunction restraining the enforcement or operation of an Act of Congress must be sought. Flemming v. Nestor, 363 U.S. 603, 607 (1960). A three-judge district court need not be convened where the constitutionality of an Act of Congress is merely "drawn in question." Garment Workers v. Donnelly Company, 304 U.S. 243 (1938).

In the instant case, a judgment for Ward in the district court would not have restrained the enforcement or operation of the FWPCA. The self-reporting aspect of the Act would not have been impaired. Likewise, civil penalties could still have been assessed provided the Government could prove its case based on evidence derived from a source wholly independent of the compelled disclosure. *Cf.* Harrison v. United States, 392 U.S. 219 (1968); Wong Sun v. United States, 371 U.S. 471 (1963). In Garment Workers v. Donnelly Co., *supra*, the Court observed:

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[3] Although § 2282 has since been repealed it remains effective as to pending suits. Act of August 12, 1976, P.L. No. 94-381, 90 Stat. 1119.

> "[The predecessor of § 2282] does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress . . . . Had Congress intended the provision . . ., for three judges and direct appeal, to apply whenever the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase 'drawn in question' " . . . .
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> 304 U.S. at 250.

See also: Flemming v. Nestor, *supra*, at 607.

We hold that the trial court did not err in refusing to convene a three-judge district court.

II.

As his primary ground for reversal, Ward contends that the self-reporting requirements of § 1321(b)(5) violate the self-incrimination clause of the Fifth Amendment when a report filed under that section is subsequently used to establish liability for purposes of assessing civil penalties pursuant to § 1321(b)(6).

It is, of course, fundamental that the Fifth Amendment protects only communications which are testimonial in nature, compelled and incriminating. *See*: Fisher v. United States, 425 U.S. 391, 408 (1976). The report mandated by sub-part (b)(5) is testimonial in character. *See*: Andreasen v. Maryland, 427 U.S. 463 (1976). Moreover, it is clear that Ward was compelled to "notify the appropriate agency of the United States Government of [the oil] discharge"

under pain of criminal prosecution. 33 U.S.C. § 1321 (b)(5). Such required self-reporting has consistently been held to be compulsory for purposes of the Fifth Amendment. Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

The basic issue we must here confront is: Whether the civil penalties prescribed in sub-part (b)(6) are, in reality, criminal in nature thereby precluding use of a compelled report made pursuant to sub-part (b)(5) of § 1321.

Judicial determinations as to the civil or penal nature of a particular provision generally center around the issue of "whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question." Telephone News-System, Inc. v. Illinois Bell Telephone Company, 220 F. Supp. 621, 630 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964); Kennedy v. Mendoza-Martinez, *supra;* Trop v. Dulles, 356 U.S. 86 (1958). In undertaking our assessment of the statutory provisions here in question, we must analyze (i) the Congressional intent discernible from the face of the statute, (ii) the enforcement mechanism of the statute, and (iii) the indicators of Congressional intent enumerated by the Supreme Court in Kennedy v. Mendoza-Martinez, *supra.*[4]

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[4] *See:* Atlas Roofing Company, Inc. v. Occupational S. & H. Rev. Com'n, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

Statutory Language

The FWPCA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of these goals, Congress specifically prohibited the discharge of oil or other hazardous substances into the navigable waters of the United States and created a statutory enforcement scheme to carry out its mandates. *See*: 33 U.S.C. § 1321. Under the provisions of this enforcement scheme, every owner or operator of a discharging facility is required to immediately notify the Coast Guard of a discharge of oil or other hazardous substance. Should such an owner-operator fail to do so, he may be fined not more than $10,000, imprisoned for not more than one year, or both. 33 U.S.C. § 1321(b)(5).

In addition to this self-reporting requirement, owners and operators of discharging facilities are liable for clean-up costs, subject only to the defenses of act of God, act of war, negligence of the United States government, or act or omission of the third party. 33 U.S.C. § 1321(f). In the event that the discharged substance is determined to be "non removable," civil penalties may be assessed based upon toxicity, degradability, and the dispersal characteristics of the substances discharged. 33 U.S.C. § 1321 (b)(2)(B). This civil penalty is again subject to the above-enumerated defenses.

Also, each owner or operator of a discharging facility is automatically assessed a "civil penalty" in amount of not more than $5,000 for each offense. 33

U.S.C. § 1321(b)(6). The assessment of this penalty is without regard to fault and subject to no defenses. In determining the amount of the penalty, the Coast Guard is directed, by statute, to consider the "appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner of operator's ability to continue in business, and the gravity of the violation . . . ." 33 U.S.C. § 1321(b)(6). The civil penalties collected pursuant to sub-part (b)(6) and the "liquidated damages provisions" found in sub-part (b)(2)(B) are deposited into a revolving fund maintained by the Government to defray the costs of administration and cleaning up oil spills in situations where the clean-up costs are otherwise not recoverable—where spills are unreported, caused by acts of God, or committed by financially insolvent persons. *See*: 33 U.S.C. § 1321(k).

The fact that the civil penalty assessed pursuant to sub-part (b)(6) forms a part of this "revolving fund" indicates its remedial nature. *See*: United States v. Tex-Tow, Inc. 589 F.2d 1310 (7th Cir. 1978); United States v. General Motors Corporation, 403 F. Supp 1151 (D. Conn. 1975).

However, the statutory language dealing with the automatic assessment and determination of the amount of the penalty indicates a punitive intent. The penalty is assessed automatically in every case without regard to fault. No defenses are available. Thus, while the remedial purpose of the revolving fund is to defray the costs of administration and cleaning up of oil spills in situations where clean up

costs are otherwise not recoverable, the factors used in determining the amount of the penalty are not, in our view, reasonably related to the purposes of the revolving fund. Rather, the factors are based on a retributive and punitive motivation.

The civil penalty cannot be characterized as compensatory. The statute specifically provides for reimbursement of clean up costs or, in the event the substances determined as "nonremovable," liquidated damages. 33 U.S.C. §§ 1321(b)(2)(B) and 1321(f). This obligation for clean-up costs does not relieve the owner or operator of the discharging facility from liability for civil penalties under § 1321(b)(6).

Thus, in our view, while the statute, on its face, tends to evidence a punitive intent, we do not consider this determination as conclusive for purposes of treating it criminal in nature. We, therefore, turn to a consideration of the remaining factors: the administrative enforcement scheme and the Kennedy v. Mendoza-Martinez indicators of Congressional intent.

The Administrative Enforcement Scheme

The authority for assessment and collection of civil penalties pursuant to sub-part (b)(6) is vested in the United States Coast Guard. 33 U.S.C. § 1321(b)(6); Executive Order No. 11735, 38 Federal Register 21243 (1973), Reprinted 33 U.S.C.A. § 1321 (Supp. 1977). By virtue of this authority, the Coast Guard issued Commandant Instruction 5922.11A dealing with the assessment of civil penalties under sub-part (b)(6). The Commandant Instruction sets out sev-

eral criteria which the Coast Guard uses in determining the amount of penalty to be assessed:

> Consistent with the language of the Federal Water Pollution Control Act, Coast Guard policy *requires* the assessment of a civil penalty for each discharge of oil in violation of Section 311(b)(3) [1321(b)(3)]. . . . It is Coast Guard policy to assume that the penalty will be at or near the *maximum* unless a lesser penalty is justified by one of the factors listed in Section 311(b)(6) [1321(b)(6)].
>
> A number of considerations may be made in determining the gravity of a violation, such as the *degree of culpability* associated with the violation, the *prior record* of the responsible party, and the *amount of oil discharged. Substantial and intentional discharges should result in severe penalties, as should cases of gross negligence, and so on.* This is not to suggest that other considerations may not combine to determine the gravity of the violation.
>
> *Two factors should not be considered* in fixing the amount of the civil penalty: (1) *the responsible party's removal effort or expense* and (2) a decision by Federal and/or state authorities to bring criminal action for the same discharge. Liability for a civil penalty under Section 311(b)(6) [1321(b)(6)] attaches at the time of discharge. It is entirely unrelated to the subsequent removal responsibility for which the discharger must bear the expense, either directly or by reimbursing the Pollution Fund. *In no case may a responsible party avoid or reduce a*

civil penalty by removing the discharged oil . . . . (Emphasis supplied.)[5]

In our view, the administrative enforcement mechanism applied by the Coast Guard clearly indicates that the assessment and determination of the amount of the penalty is based upon punitive considerations. The Coast Guard commandant instruction "requires the assessment of a civil penalty for each discharge of oil." The factors considered in determining the amount of the penalty are further removed from the remedial aspects of the "revolving fund" than are those factors enumerated in the statute. Among other things, the Coast Guard is to consider the degree of culpability, prior record and amount of oil discharged. Intentional discharges and those resulting from gross negligence "should result in severe penalties." A party may not "avoid or reduce a civil penalty by removing the discharged oil." This language is lacking in any "remedial" ring! The costs of investigation are not considered in assessing the amount of the penalty. Similarly, the factors involved in determining the amount of the penalty are not in any way related to what damage may have occurred to the environment by reason of the discharge. *See*: United States v. W.B. Enterprises, Inc., 378 F. Supp. 420, 422-423 (S.D. N.Y. 1974).

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[5] Commandant Instruction 5922.11A is reprinted in the Appendix to United States v. LeBeouf Brothers Towing Company, Inc., 377 F. Supp. 558 (E.D. La. 1974), reversed, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977).

Indicators of Congressional Intent

In Kennedy v. Mendoza-Martinez, *supra*, the Supreme Court enumerated a series of "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in nature":

> [I] Whether the sanction involves an affirmative disability or restraint, [II] whether it has historically been regarded as punishment, [III] whether it comes into play only on a finding of *scienter*, [IV] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [V] whether the behavior to which it applies is already a crime, [VI] whether an alternative purpose to which it may rationally be connected is assignable for it, and [VII] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in different directions. Absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face. (Footnotes omitted.)
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> 372 U.S., at 168-169.

[I] "Whether the sanction involves an affirmative disability or restraint." Generally, imposition of monetary penalties does not involve the type of affirmative disability or restraint which occurs in the revocation of a previously granted governmental privilege. *See*: Flemming v. Nestor, *supra*. Nevertheless, the imposition of monetary penalties does "inflict a pocket-book deterrence or restraint on the re-

cipient." Atlas Roofing Company vs. Occupational Safety and Health Review Commission, *supra*, at 1001. Thus, because a sanction is used equally for both nonpunitive and punitive purposes, it offers little indication as to Congress' intent in this instance.

[II] "[W]hether it [the sanction] has historically been regarded as punishment." This indicator also gives little indication as to Congress' intent. Monetary penalties have traditionally been applied to both criminal and civil statutes.

[III] "[W]hether the sanction is activated only on a finding of *scienter*." The statute, on its face, does not contain an element of *scienter*.[6] The fine is automatically assessed without regard to fault. Thus, at first blush, this factor seems to weigh heavily in favor of the regulatory nature of the penalty. However, the factors enumerated in the statute and the Commandant Instruction used in determining the amount of the penalty indicate a *scienter* requirement. They speak of the "gravity of the violation," "degree of culpability," and whether the discharge was intentional or resulted from gross negligence.

Moreover, the statute dealing with the imposition of criminal penalties for the discharges of oil or hazardous substances similarly does not require *scienter*. *See*: 33 U.S.C. § 407 and 411; United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974).

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[6] Prior to 1972, the civil penalty provision in question, then codified at 33 U.S.C. § 1161(b)(5), specifically included the element of acting "knowingly" and provided for a maximum penalty of $10,000.

Thus, this indicator lends a credence to a finding that the statute is criminal in nature.

[IV] "[W]hether the statute promotes the traditional aims of punishment—retribution and deterrence." In our view, this factor lends considerable weight to a finding that the civil penalty is actually criminal in nature. The statute and the administrative policies adopted pursuant thereto have the effect of retribution. The penalties are based on such factors as the gravity of the violation, the degree of culpability and the prior record of the party. The fact that a party acted in good faith, could not have avoided the discharge and, once it occurred, undertook clean-up measures immediately is to be given no consideration in relation to the "imposition or amount of a civil penalty."

We do not believe that the deterrence factor comes into play in any significant measure. The deterrence aspect of the statute as a whole is not found in subpart (b)(6), but rather in the compensatory damage aspects of the statute.

Thus, we conclude that the retributive aspect of the civil penalty provision weighs heavily in favor of finding the statute penal in nature.

[V] "[W]hether the behavior to which it applies is already a crime." This factor falls clearly in favor of a finding that the statute is criminal in nature. Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 specifically prohibits the discharge of refuse matter of any kind or description into the navigable waters of the United States. In United

States v. White Fuel Corporation, *supra*, the court considered § 407 and held that a tank farm operator could properly be held criminally liable where oil found in navigable waters came from an accumulation of oil which had gathered under the operator's property and seeped into the water through indirect percolation. The court characterized § 407 as a "strict liability statute" and held that common law *mens rea* need not be alleged or proven.

The factual situation presented in *White Fuel Corporation* is almost entirely analogous to the circumstances presented in this case. It is, therefore, clear that the behavior to which the civil penalty applies is already a crime.

[VI] "[W]hether an alternative purpose other than punishment may rationally be ascribed to the sanction." We have heretofore discussed the remedial aspects of the civil penalty as they refer to the Pollution Fund. In addition to these factors, the Government urges that the penalty can be regarded as compensation to the United States for tortious damage to the environment. *See*: United states v. W.B. Enterprises, Inc., *supra*. We agree that the penalty could be regarded as such compensation, if the factors involved in determining the amount thereof reasonably related to the extent of damage to the environment. However, as previously noted, the factors are not addressed to this issue. Therefore, we decline to employ the Government's rationale.

[VII] "[W]hether the sanction appears excessive in relation to the alternative purpose assigned." The

answer to this question is not easily resolved, because civil penalties are variable in nature. However, we believe that the factors employed in determining the amount of the penalty indicate a punitive nature. Imposition of penalties even in situations where the discharge is accidental, non-negligent and non-intentional, could be excessive. This is especially so, when the operator, in good faith, attempts to clean up, and, in fact, does clean up the discharge on his own initiative. Inasmuch as the amount of the penalty is correlated to the size of the business involved, a large business concern may very well be heavily penalized despite the lack of fault. Any subsequent clean up operations and attempted removal by the operator would not mitigate this penalty. Commandant Instruction 5922.11A, *supra*. In such a situation, the imposition of a large penalty would be excessive. Thus, we conclude that this indicator leans in favor of the penal nature of the Act.

We are reluctant to set aside a statutory enforcement scheme created under an Act of Congress, Flemming v. Nestor, *supra*. Nevertheless, we must recognize and abide the maxim that the privilege against self-incrimination should be liberally construed. Michigan v. Tucker, 417 U.S. 433 (1974). A detailed examination of the language of the statute, the administrative enforcement scheme, and the indicators of Congressional intent, lead us to conclude that the civil penalty found in 33 U.S.C. § 1321

(b) (6) is criminal in nature.[7] For all of the reasons above related and discussed, we therefore hold that the compelled notification of discharge required to be filed with the Coast Guard pursuant to § 1321 (b) (5) cannot be used in determining either liability for or the amount of civil penalties imposed under § 1321(b) (6). We do not, however, strike down the self-reporting requirements of § 1321(b) (5) or the statute requiring imposition of civil penalties under 1321(b) (6). In our view, it is permissible to assess civil penalties based on a discharge of oil or other hazardous substance under the Act, providing that the evidence used to establish the discharge is derived from a source wholly independent of the compelled disclosure required by § 1321(b) (5). *See*: Harrison v. United States, *supra;* Wong Sun v. United States, *supra.*[8]

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[7] We were not presented with and we do not decide the question of whether 33 U.S.C. § 1321(b) (6) is criminal in nature for any purpose other than protecting an individual's right against self-incrimination under the Fifth Amendment to the United States Constitution.

[8] We wish to emphasize that our holding today does not preclude the use of the notification of discharge filed pursuant to subpart (b) (5) in a proceeding for assessment and determination of the civil penalties under sub-part (b) (6) where a corporation, rather than an individual, is involved. *See:* United States v. Allied Towing Corporation, 578 F.2d 978 (4th Cir. 1978); United States v. LeBeouf Brothers Towing Company, Inc., supra.

Reversed and remanded for further proceedings consistent with this opinion in the collection suit, No. 76-0546E of the District Court; there being no need for injunctive relief as sought in No. 76-0303E, that cause shall be dismissed on remand.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 77-1952

MARCH TERM—May 10, 1979

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett and Honorable Monroe G. McKay, Circuit Judges

L. O. WARD, PLAINTIFF-APPELLANT

vs.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, RUSSELL E. TRAIN, individually and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS-APPELLEES

and

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

L. O. WARD and L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS-APPELLANTS

OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC., MOUNTAIN STATES LEGAL FOUNDATION, INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES AND ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AMICI CURIAE

JUDGMENT

No. 77-1952

(D.C. Nos. 76-0303-E & 76-0456-E)

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that Court is reversed. The cause is remanded to the United States District Court for the Western District of Oklahoma for further proceedings in No. 76-0456-E, the collection suit, in accordance with the opinion of this Court.

It is further ordered that cause No. 76-0303-E shall be dismissed by the United States District Court for the Western District of Oklahoma on remand.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
W. D. OKLAHOMA

Nos. CIV-76-0303-E, CIV-76-0456-E

L. O. WARD, PLAINTIFF

v.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, et al., DEFENDANTS

UNITED STATES OF AMERICA, PLAINTIFF

v.

L. O. WARD and L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS

Dec. 22, 1976

MEMORANDUM OPINION AND ORDER

EUBANKS, District Judge.

38 U.S.C. § 1321(b) provides, in pertinent part:

> "The discharge of oil or hazardous substances into or upon the navigable waters of the United States . . . is prohibited . . . .
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> * * * * *
>
> "Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged . . . shall be assessed a civil penalty . . . of not more than $5,000 for each offense. . . ."

On or about March 23, 1975, oil overflowed from an open-earth pit at a drilling site owned and operated by L. O. Ward and L. O. Ward Oil and Gas Operations and flowed into Boggie Creek, Garfield County, Oklahoma. A report of the incident was submitted by Ward and received by the Dallas office of the Environmental Protection Agency on or about June 25, 1975. The report was referred to the Second United States Coast Guard District and on the 19th of December, 1975, its Commander assessed a civil penalty of $500 against Ward.[1] On December 26, 1975, Ward appealed the assessment to the Commandant of the Coast Guard, which appeal was denied on February 11, 1976.

On April 13, 1976, Ward brought action in this court for injunctive and declaratory relief, praying that a three-judge court [2] declare unconstitutional and enjoin the enforcement of certain provisions of 33 U.S.C. §§ 1318, 1319, 1321 and of 40 C.F.R. 110.[3] On June 4, 1976, the United States of America sued Ward and L. O. Ward Oil and Gas Operations to col-

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[1] No contention is made that the Commander failed to observe the requisites of notice and opportunity to be heard.

[2] The motion to convene a three-judge court was denied conditionally on April 27, 1976, and unconditionally on August 26, 1976, on ground no substantial challenge to the constitutionality of the statute was presented.

[3] For the purpose of simplification, the challenged provisions of the statute wil be referred to as the reporting and penalty provisions of the Federal Water Pollution Control Act (FWPCA); the challenged provisions of the regulation as the "sheen" test.

lect the unpaid penalty. The actions have been consolidated.[4]

Now before the court for disposition is defendants' motion for judgment on the pleadings or for summary judgment. Defendants argue that they are entitled to judgment as a matter of law because the penalty imposed is criminal or quasi-criminal and thus the self-reporting provision violates the protection against self-incrimination afforded by the Fifth Amendment to the Constitution of the United States; because the penalty is imposed without regard to fault, and such strict liability violates the protection against undue process afforded by the Fifth Amendment; and because the regulatory "sheen" test is not such a definition of harmful quantities of spillage as is authorized by the FWPCA.[5]

CHARACTERIZATION OF THE PENALTY IMPOSED

"The question of whether a given sanction is civil or criminal is one of statutory construction." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917 (1938).

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[4] Hereinafter, Ward and/or L. O. Ward Oil and Gas Operations will be referred to as "defendant[s]."

[5] The Independent Petroleum Association of America has filed a brief amicus curiae joining in defendants' contentions and urging further that the court invalidate the "sheen" test as a denial of the equal protection of the laws.

The sections of the FWPCA under attack read in pertinent part:

> "(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vesesl or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.
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> "(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's

ability to continue in business, and the gravity of the violation, shall be considered by such Secretary."

That Congress has labelled the penalty provided for in subsection (6) "civil" is entitled to due consideration. *United States* v. *J. B. Williams Co., Inc.*, 498 F.2d 414, 421 (2d Cir. 1974). Provision for administrative imposition of the penalty is indicative of congressional intent to impose a civil sanction. *Helvering, supra* at 402, 58 S.Ct. 630.

However, it is not only the characterization given that section by Congress which is significant, but its juxtaposition with and distinction from the preceding subsection's provision for criminal penalty. "The fact that the sanctions were separate and distinct and were contained in different parts of the statutory scheme is relevant in determining the character of the [penalty]." *One Lot Emerald Cut Stones, supra* 409 U.S. at 236, 93 S.Ct. at 493.

This court is of the opinion that subsection (6) is unambiguous and that congressional intent to impose a civil penalty can be discerned from its face.[6] That

[6] See *United States* v. *LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149 (5th Cir. 1976). That court stated that inquiry into the nature of the penalty is necessary only if the statutory language is ambiguous or a constitutional right is involved. At 151. Finding no Fifth Amendment issue properly before it, the protection against self-incrimination not being available to the corporate defendants, the court determined "the issue is purely one of statutory construction, and appellees are foreclosed by the clear statutory wording. . . . Congress . . . expressly labeled the sanction in 33 U.S.C. § 1161(b)(5) [the predecessor to 33 U.S.C. § 1321(b)(6)] . . . a 'civil penalty.' Only the most compelling demonstration of a contrary legislative intent would persuade us to ignore the plain words of the statute." At 152.

But see *United States* v. *General Motors Corp.*, 403 F.Supp. 1151, 1158 (Conn. 1975), in which the *Mendoza-Martinez* tests were applied because "the congressional intent is ambiguous."

determination would be an end to this matter were the issue before the court solely one of statutory construction. But the (noncorporate) defendants in this case have raised constitutional issues, and inquiry beyond the face of the statute should be undertaken "when some constitutional protection is implicated by the imposition of a penalty." *United States* v. *LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149, 151 (5th Cir. 1976); *United States* v. *J. B. Williams Co., supra* at 421.

The court deems such inquiry properly made by application of the criteria set forth in *Kennedy* v. *Mendoza-Martinez*, "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," to wit:

> "whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." 372 U.S. 144, 168-169, 83 S.Ct. 554, 567, 9 L.Ed. 2d 644 (1963).

a. *Affirmative Disability or Restraint*

The question is not whether there is, or there is no, affirmative disability or restraint imposed, but whether the affirmative disability or restraint imposed is of a civil or criminal nature. This court concludes that the facts that only a monetary sanction is imposed and its collection is effectuated through a civil procedure bespeak of a civil penalty. See also *United States* v. *Eureka Pipeline Co.*, 401 F.Supp. 934, 939 (N.D.W.Va. 1975).

b. *Historical Characterization*

The result of this test can only be inconclusive: clearly, fines have long been meted out to sanction criminal conduct; on the other hand "civil penalties are not uncommon in federal law." *American Smelting & R. Co.* v. *OSHRC*, 501 F.2d 504, 515 (8th Cir. 1974); *Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200, 1204 (3d Cir. 1975).

c. *Scienter*

"This factor clearly points toward the remedial function of the § 1321(b)(6) penalty, since there is no requirement of *scienter* in the present statute." [7] *United States* v. *General Motors Corp.*, 403 F.Supp. 1151, 1162 (Conn. 1975).

[7] In 1972, by amendment, the scienter requirement was eliminated.

d. *Purpose of the Sanction*

Defendants contend that both the intent and the effect of the imposition of this penalty is "to punish spillers of oil."

The court does not agree that the provision for a penalty was designed to effect retribution. "[T]he basic thrust of § 1321(b)(6) . . . is aimed less at the acts of polluters than at the resulting pollution itself." [8] *General Motors, supra* at 1162.

The FWPCA declares its objective to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). Congress sought to facilitate achievement of this goal by, *inter alia*, including the self-reporting and penalty provisions "to prevent harmful spills [9] and to minimize the damage caused by such spills." [10] *LeBeouf Bros., supra* at 152.

That such provisions may promote the traditional criminal law aim of deterrence does not make the penalty, *ipso facto*, a criminal one. Indeed, it would be difficult to divorce the deterrent function from a regulatory scheme. "Business is encouraged to comply with the law not only because that is what the law

[8] If there be any intent to punish, it would be the intent to punish the act of not reporting an oil spill.

[9] "[B]y making care more economical than carelessness." *General Motors, supra* at 1162.

[10] By establishing in § 1321(k) "a 'revolving fund' into which all fines received under the Act are to be deposited to defray the cost of oil removals." *LeBeouf Bros., supra* at 153.

exacts but because failing to do so will bring down on the activity or purse noncriminal consequences." *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 1009 (5th Cir. 1975).

e. *Whether Such Behavior is Already a Crime*

The Spilling of oil could be punished criminally. Rivers and Harbors Act, 33 U.S.C. §§ 407, 411. However, one who reports a spill would be entitled to invoke the immunity provision of § 1321(b)(5). The two courts which have had occasion to apply this test to this Act have deemed the result inconclusive. *General Motors, supra* at 1163; *Eureka Pipeline, supra* at 940.

f. *Alternative Purpose*

The court has already determined that the deterrent effect is an "unavoidable byproduct" [11] of the Act's primary objectives. Inasmuch as the purpose of the penalty is to defray the costs of the Act's administration and of clean-up expenses, and is therefore clearly compensatory and remedial, there is no need to search for some alternative [i.e., alternative to a punitive] purpose.

g. *Whether Penalty is Excessive*

The maximum penalty which may be assessed is $5,000.[12] Given the cost which would be incurred in

[11] *General Motors, supra* at 1163.

[12] Reduced from the original $10,000 provision by amendment in 1972.

removing harmful discharges, that amount does not appear excessive. Furthermore, it is significant that Congress has provided that certain "mitigating" factors [13] may be taken into acount in assessing the penalty; such "flexibility" indicates the civil character of the sanction. *General Motors, supra* at 1163. See also *Eureka Pipeline, supra* at 941.

The court concludes that the penalty provided for is a civil penalty, purposed to effectuate a regulatory and remedial scheme in which self-reporting is properly required.[14]

STRICT LIABILITY AND DUE PROCESS

The essence of strict liability is the shifting of accidental loss, as between non-negligent parties,[15] to the one most able to insure against the risk and bear the cost. In the FWPCA, Congress has chosen to shift the cost of damage done to the environment from the public to the owner or operator of the facility from which a harmful discharge emanated. Congress further saw fit to minimize defenses, in order to inspire "performance rather than excuses." [16] This court agrees

[13] See latter part of subsection (6) quoted at page 1355 herein.

[14] See *California* v. *Byers*, 402 U.S. 424, esp. 429-431, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971).

[15] The court does not thereby intend any inference as to the degree of culpability, if any, of defendants in this case.

[16] *United States* v. *White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974).

with the United States District Courts of Connecticut and the Northern District of West Virginia that the imposition of penalty after notice and hearing and after due regard given ability to pay and the gravity of the violation, withstands constitutional attack. *General Motors*, *supra* at 1157; *Eureka Pipeline*, *supra* at 942.

THE SHEEN TEST

The FWPCA, § 1321(b)(3), prohibits:

> "The discharge of oil or hazardous substance into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (4) of this subsection . . . ."

Subparagraph (4) provides:

> "The President shall by regulation, . . . determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States . . . ."

The authority to define harmful quantities was delegated by the President to the Secretary of the Interior. The resulting regulation, 40 C.F.R. § 110.3, provides:

> "For purposes of section 11(b) of the Federal Act, discharges of such quantities of oil into or upon the nagivable waters of the United States

> or adjoining shorelines determined to be harmful to the public health or welfare of the United States . . . include discharges which:
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> "(a) Violate applicable water quality standards, or
>
> "(b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."

The issue before the court is whether defendants have carried their heavy burden of showing "that the sheen test determination of harmfulness cannot be considered a reasonable expression of the Congressional will." *United States* v. *Boyd*, 491 F.2d 1163 (9th Cir. 1973).

Congress did not intend that every discharge be deemed harmful; it intended that de minimus discharges, and discharges "from a properly functioning vessel engine" [17] be exempted from the definition. The

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[17] It is this distinction which amicus curiae contends renders the sheen test violative of equal protection. The Ninth Circuit has inquired into the exemption at length, in *United States* v. *Boyd*, *supra* at 1169:

> "Appellant further contends that the exception to the sheen test—i.e., 'discharges of oil from a properly functioning vessel engine . . . '—demonstrates the irrationality of the sheen test itself. He points out that this exception allows a ship captain to escape the nonreporting penalty for any amount of oil spilled from a properly functioning engine, whether or not it is enough to create a sheen. In other words, the harmfulness of the spill is made to depend on its source. While at first blush this

sheen test distinguishes the harmful from the de minimus spill on the basis of what can be observed, rather than measured. The Court of Appeals for the Ninth Circuit has reasoned:

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may seem a curious result, we are persuaded that the exception is reasonable. . . .

"Determination of harmfulness 'to the public health or welfare of the United States' requires balancing the competing interests of environmental protection and unrestricted passage on navigable waters. It is precisely this balancing which the 'properly functioning engines' exception reflects. Indeed, the exception was included in the Regulations at the behest of Congress. When the Regulations were originally proposed, after passage of the Act, the sheen test did not contain the exception. During committee hearings on the proposed Regulations, Senator Muskie remarked:

. . . At a minimum the President can and should immediately by regulation prohibit the discharge of oil which exceeds the amount normally anticipated in operation of a vessel. . . .

It is obvious, then, that *both committees* [the House and Senate committees working on the bill] *felt that the minimal amounts of oil discharged in the normal operation of a properly functioning vessel engine ought not to be subject to the notice requirements of the law. . . . (Emphasis added.)*" [*Citation omitted.*]

After these hearings, the exception was adopted by the Department." 40 C.F.R. § 110.6.

The regulation thus was a reflection of congressional intent to discriminate in favor of a specific class so as to avoid unduly burdening waterway traffic and commerce. Unequal protection is not precluded by the Fifth Amendment, but only such discriminatory classification—not involved here—as is so arbitrary and injurious as to violate due process. *Detroit Bank* v. *United States*, 317 U.S. 329, 337-38, 63 S.Ct. 297, 87 L.Ed. 304 (1943).

"As a practical matter, the sheen test is more appropriate than, for example, a numerical test, or a determination that a 'substantial' amount of spilled oil is harmful. A numerical test creates not only the inherent difficulty of accurate observation as to the quality discharged, it also may spawn an incentive to be inaccurate so as to avoid the obligation of reporting. Moreover, if the term 'substantial' were used, there would be endless confusion over its meaning." *United States* v. *Boyd, supra* at 1168.

That court concluded: "Nothing has been shown on the facts in this case, to indicate that the Department's Regulations determining harmfulness go beyond the statutory mandate." At 1170. Other courts have agreed. *United States* v. *Chevron Oil Co.*, CIV-74-400 (E.D. La., filed Oct. 11, 1976); *United States* v. *Beatty, Inc.*, 401 F.Supp. 1040 (W.D. Ky. 1975). This court does too.

Accordingly,

IT IS ORDERED that defendants' motion for judgment on the pleadings or for summary judgment be and the same hereby is denied.

APPENDIX D

Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1321, as in effect at the time this case arose, read:

Oil and hazardous substance liability—

(a) Definitions.

For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning,

operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section.

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; determination of removability; liability; penalties.

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B)(i) The Administrator shall include in any designation under subparagraph (A) of this subsection a determination whether any such designated hazardous substance can actually be removed.

(ii) The owner or operator of any vessel, onshore facility, or offshore facility from which there is discharged during the two-year period beginning on October 18, 1972, any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject

to the defenses to liability provided under subsection (f) of this section, as appropriate, to the United States for a civil penalty per discharge established by the Administrator based on toxicity, degradability, and dispersal characteristics of such substance, in an amount not to exceed $50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for a civil penalty in such amount as the Administrator shall establish, based upon the toxicity, degradability, and dispersal characteristics of such substance.

(iii) After the expiration of the two-year period referred to in clause (ii) of this subparagraph, the owner or operator of any vessel, onshore facility, or offshore facility, from which there is discharged any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for either one or the other of the following penalties, the determination of which shall be in the discretion of the Administrator:

(aa) a penalty in such amount as the Administrator shall establish, based on the toxicity, degradability, and dispersal characteristics of the substance, but not less than $500 nor more than $5,000; or

(bb) a penalty determined by the number of units discharged multiplied by the amount established for such unit under

clause (iv) of this subparagraph, but such penalty shall not be more than $5,000,000 in the case of a discharge from a vessel and $500,000 in the case of a discharge from an onshore or offshore facility.

(iv) The Administrator shall establish by regulation, for each hazardous substance designated under subparagraph (A) of this paragraph, and within 180 days of the date of such designation, a unit of measurement based upon the usual trade practice and, for the purpose of determining the penalty under clause (iii) (bb) of this subparagraph, shall establish for each such unit a fixed monetary amount which shall be not less than $100 nor more than $1,000 per unit. He shall establish such fixed amount based on the toxicity, degradability, and dispersal characteristics of the substance.

(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine

and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation, to be issued as soon as possible after October 18, 1972, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches except that in the case of the discharge of oil into or upon the waters of the contiguous zone, only those discharges which threaten the fishery resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

(c) Removal of discharged oil or hazardous substances; National Contingency Plan.

(1) Whenever any oil or a hazardous substance is discharged, into or upon the navigable

waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous sub-

stance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances to the appropriate Federal agency;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or

States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

(d) Maritime disaster discharges.

Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection shall be a cost incurred by the United States Government for the purposes of subsection (f) of this

section in the removal of oil or hazardous substance.

(e) Judicial relief.

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

(f) Liability for actual costs of removal.

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to

the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $8,000,000, except

that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government

for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(g) Third party liability.

In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D)

an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

(h) Rights against third parties who caused or contributed to discharge.

The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or

(2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

(i) Recovery of removal costs.

(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

(j) Regulations; penalty.

(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore faciilties, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the

amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

(k) Authorization of appropriations.

There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (*l*) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

(*l*) Administration.

The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

(m) Boarding and inspection of vessels; arrest; execution of warrants or other process.

Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

(n) Jurisdiction.

The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected.

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

(p) Financial responsibility.

(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be

prescribed from time to time by the President, evidence of financial responsibility of $100 per gross ton, or $14,000,000 whichever is the lesser, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after October 18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner

or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 300366 67

Supreme Court, U. S.
FILED
JAN 2 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

L. O. WARD d/b/a
L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 7, 1979
CERTIORARI GRANTED NOVEMBER 5, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

L. O. WARD d/b/a
L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CIV-76-0303-E

WARD, L. O., PLAINTIFF

COLEMAN, WILLIAM J., JR., individually and as Secretary of Transportation for the United States of America;

TRAIN, RUSSELL E., individually and as Administrator of the Environmental Protection Agency of the United States of America, and

SILAR, ADMIRAL, OWEN W., individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS

Consolidated W/76-456 8-26-76

CAUSE

32 USC 1321(n); 28 USC 1331, 2201-02, 1333, 1332, 1355—Temp. & perm. Injs. restraining enforcement of statutes relating to oil pollution of inland water; and Declaratory Judg. re navigability of "Boggy Creek" in this Dist.

FOR PLAINTIFF

Stephen Jones & James H. Gungoll, P.O. Box 3339, Enid, Ok 73701 (405) 233-4321

Harold B. Scoggins, Jr., Independent Petroleum Assn. of America (Amicus Curiae)

FOR DEFENDANTS

David L. Russell, USA, Roland Campbell, III, & O. B. Johnston, III, AUSA, 4434 U.S. Cthse, OC, 231-5281

and

Bruce J. Chasan, Atty, Dept of Justice, Wash, D.C. 20530 (202) 739-2793

Earl Salo, Atty, Dept of Justice, Wash, DC 20530 (202) 739-2738

DOCKET ENTRIES

DATE	PROCEEDINGS

4-13-76 Filed Complaint

4-13-76 Filed prae for & iss'd summons

4-13-76 Filed plf's Mtn for 3 Judge Ct—ws

4-13-76 Filed plf's Brief in Sup of Mtn—ws

4-15-76 Filed Order directing dfts to respond to plf's Mtn for 3 Judge Ct w/brief, w/i 7 days herefrom in the event they or either of them desire to contest said mtn (Eubanks) ws

4-23-76 Filed Dfts' Oppo to the Mtn to Convene a 3-Judge Ct—ws

4-27-76 Filed Dfts' Mtn for Addl Time to Respond to Plf's Mtn for 3 Judge Ct. w/Order grntg a ext of 5 days to 4-27-76 to file its Response (Eubanks) ws

4-27-76 Filed Order that the plf's mtn for an order of this ct req'g the Chief Judge of the Circuit to convene a 3-judge district ct to hear this matter is conditionally denied (Eubanks) ws

5-18-76 Filed USM's Ret re Summons: (4)

Served U.S. Attorney General 4-14-76, 2 cert copies mailed to U.S. Atty Gen 4-13-76

Served William Coleman, Secretary of Transportation 4-22-76 by copy w/Emma Lewis

Served Owen W. Silare, Commandant U.S. Coast Guard by copy w/J. Collom 4-22-76

Served Russell Train, Adm Environmental Protective Agency by copy w/Georgia Prapas 5-5-76

6-7-76 Filed plf's Brief to Sup Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

6-8-76 Filed plf's Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

DATE	PROCEEDINGS

6-8-76 Ent Order grntg dfts 15 days to respond to plf's Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct (Eubanks) zmc ws

6-9-76 Filed Dfts' Mtn to Dism or, Alt, to Consolidate W/ CIV-76-0456-D w/Memo of Law attach—ws

6-10-76 Ent Order directing plf to respond to dfts' Mtn to Dism or, Alt, to Consolidate w/ CIV-76-0456-D w/sup brief, w/i 10 days hereof (Eubanks) zmc ws

6-24-76 Filed Dfts' Response to Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

6-25-76 Filed Plf's Ans to Mtn to Dism or Alt to Consolidate W/CIV-76-0456-D—ws

7-1-76 Filed Plf's Reply to Dfts' Response to Plf's Mtn to Reconsider Order Temp Denying Mtn for 3 Judge Ct—ws

8-18-76 Filed Mr. Chason's ltr to Ct re outstanding mtns—ws

8-20-76 Filed Mr. Chason's ltr to Ct re outstanding mtns & trans. copy of CCofA's opinion—ws

8-25-76 Filed Mr. Jones' ltr to Ct, i.e., response to Mr. Chasan's foregoing ltrs—ws

8-26-76 Filed Memo Opinion & Order; that Plf's mtn for reconsideration of this ct's order conditionally denying the mtn for a 3 judge ct is grntd & the mtn to convene a 3 judge ct is unconditionally denied; dft's mtn to dism is denied; the alt mtn to consolidate this case w/CIV-76-456 is grntd; answer in 76-456 to be filed w/i 20 days hereof (Eubanks) ws

10-4-76 PRETRIAL, November 1, 1976, 10:00 a.m. (Eubanks)

11-1-76 Filed pltf's Mtn for Judg on the Pldgs &/or for SJ—ws

11-1-76 Filed plf's Brief in Sup of Mtn—ws

DATE	PROCEEDINGS

11-1-76 Ent PT; govt to file brief w/i 20 days to answer mtn for SJ; to be on the Enid jury dkt; both sides agree we will have a trial de novo; Ward may reply 7 days after Govt responds to its mtn for SJ (Eubanks) zmc

11-22-76 Filed Dft US's Memo in Oppo to Mtn for Judg on the Pldgs &/or for SJ—ws

11-24-76 Filed Dft USA's Interrogs—w/s

12-7-76 Filed plf Ward's Reply Brief to Gov'ts Brief in Opposition to Ward's Mtn for Judgm on the Pleadings &/or S. J.—w/s

12-13-76 Filed Independent Petroleum Association of America's Mtn for Leave of Ct to file Brief Amicus Curiae—w/s

12-13-76 Filed Earl Salo's ltr to Mr. Hawks enclosing a copy of a Ct's decision dealing w/the "sheen test", requesting it be brought to the ct's attention—w/s

12-22-76 Filed Memo Opinion & Order—that dfts' mtn for judgm on the pleadings or for s. j. is denied (Eubanks) w/s-zmc

1-21-77 Filed Plf's Answers to Interrogs propounded by the United States—ws

4-1-77 JURY DOCKET: MONDAY, MAY 9, 1977—9:30 A.M.—EUBANKS

5-3-77 Filed 3 praes for & iss'd subps on behalf of plf for: Ernie Thomas, Jay Nay, Ray Pickle, Gary Sober, Curley Corwin, Bill Fisher & Rod Ylitalo

5-4-77 Filed prae for & iss'l 1 subp in blank on behalf of the dfts

5-9-77 Filed Pretrial Order (Eubanks) ws

5-9-77 Filed Govt's PT Memo

5-9-77 Ent Jury Trial (Eubanks) zmc

DATE	PROCEEDINGS

5-10-77 Filed L.O. Ward's Req for Instr w/Judge's Rlgs thereon (Eubanks) ws

5-10-77 Filed Instructions to the Jury (Eubanks)

5-10-77 Filed Note from Jury w/Judge's Answer thereon (Eubanks)

5-10-77 Filed Jury's Interrog finding as follows: that oil did flow in a visible quantity from the "draw" on the L.O. Ward lease into Boggy Creek /s/ Gary W. Chapman, Foreman

5-10-77 Ent Further Jury Trial; plf to prepare order; ct. reduces the amt of penalty to $250.00; cnsl for dft to prepare order in 76-303 (Eubanks) zmc

5-13-77 Filed USM's Ret re subps (8)

5-18-77 Filed Stephen Jones' ltr to ct req'g a hrg date—ws

5-20-77 NONJURY: 6-13-77, 9:30 am (Eubanks)

6-7-77 Ent Order striking NJ of 6-23-77, to be reset on the next Civ NJ Dkt (Eubanks) zmc ws

8-2-77 NONJURY: 9-6-77, 9:30 am (Eubanks)

8-19-77 Filed plf's Response to the Gov't Mtn to Strike w/Memo to Sup Response—ws

8-22-77 Ent Order that the Mtn to Strike by USA is o/r & denied; the cases will remain on the dkt for the purpose of getting judgs settled in these cases (Eubanks) zmc ws

8-24-77 Filed Ct's ltr transmitting a portion of the Ct Reporter's transcript of what transpired at Enid last spring, to all cnsl of Record (Eubanks) ws

8-30-77 Filed Stephen Jones' ltr to Ct dated 8-26-77—ws

8-30-77 Filed Stephen Jones' ltr to Ct dated 8-26-77, stated as 2nd ltr—ws

DATE	PROCEEDINGS

8-30-77 Ent Order that such evid as the ptys desire to introduce re the constitutionality of 40 CFR 110.3(b), as enumerated in parag. 5C of the PTA Order herein, will be heard on 9-6-77, 9:30 am (Eubanks) zmc ws

9-6-77 Ent Evid Hrg; ptys appear by cnsl, make opening stmts; plf Ward presents evid w/test of witnesses, exhs admitted, plf rests; closing args; ct finds in favor of govt who is to prepare JE in ea case today (Eubanks) zmc

9-6-77 Filed plf's Brief in Sup of the Invalidity of 40 CFR § 110.3(b) ws

9-6-77 Filed AND ENTERED Final Judgment—THAT dfts L.O. Ward and L.O. Ward Oil and Gas Operations are jointly & severally liable to the US for a civil penalty of $250. (Eubanks) (CCB #122) (Clerk) (Copies to parties—zmc)

10-19-77 Filed Notice of Appeal of L. O. Ward, plf, from final jdgmt entered Sept. 6, 1977 (record due in CCofA 11-28-77)

10-19-77 Filed Clk's ltr re service of notice of appeal, w/copy ltr & notice of appeal to counsel & CCofA and copy d.s. to CCofA

10-19-77 Filed plf's Designation of Record—w/s

CIV-76-0456-E

UNITED STATES OF AMERICA, PLAINTIFF

WARD, L. O. and L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS

Consolidated W/76-303 8-26-76

CAUSE

33 USC 1321(n) and 28 USC 1345—Action to recover unpaid civil penalty assessed against defts.

FOR PLAINTIFFS

David L. Russell, USA & AUSA, 4434 U.S. Cthse, OC, 231-5281

and

Bruce J. Chasan, Atty, Dept of Justice, Wash, DC 20530 (202) 739-2793

Earl Salo, Atty, Dept of Justice, Wash, DC 20530 (202) 739-2738

Independent Petroleum Assoc. of America (Amicus Curiae) Harold B. Scoggins, Jr., Atty

FOR DEFENDANTS

Stephen Jones, P.O. Box 3339, Enid, OK 73701

DATE	PROCEEDINGS

6-4-76 Filed Complaint

6-4-76 Filed prae for & iss'd summons

6-21-76 Filed USM's Ret re Summons: (2)

Served L. O. Ward 6-16-76

Served L.O. Ward Oil and Gas Operations by serving L.O. Ward 6-16-76

6-23-76 Filed dfts' Mtn for Enlargement of Time to Answer Compl—ws

DATE	PROCEEDINGS

7-1-76 Filed dft Ward's Mtn to Enlarge Time in Which to Answer—ws

7-6-76 Ent Order grntg dft L.O. Ward ext of time of 45 days from 7-1-76 to answer to otherwise plead (Daugherty) ve ws

8-23-76 Ent Order transferring case to Judge Enbanks (Daugherty) ve ws

8-26-76 Filed copy of Memo Opinion & Order filed in 76-303 in which Ct directs that answer be filed w/i 20 days hereof & this case is consolidated w/76-303 (Eubanks) ws

9-16-76 Filed Mr. Jones ltr to Ct requesting leave of ct to file answer one week late—w/s

9-16-76 Ent Order—for good cause shown, the defts Ware are granted 7 days from & after 9-15-76, w/in which to file their answer herein (Eubanks) zmc

10-4-76 PRETRIAL, November 1, 1976, 10:00 a.m. (Eubanks)

9-24-76 Filed dfts' Answer—ws

11-1-76 Filed dfts' Mtn for Judg on the Pldgs &/or for SJ—ws

11-1-76 Filed dfts' Brief in Sup of Mtn—ws

11-1-76 Ent PT; govt to file brief w/i 20 days to answer mtn for SJ; to be on the Enid jury dkt; both sides agree we will have a trial de novo; Ward may reply 7 days after Govt responds to its mtn for SJ (Eubanks) zmc

11-22-76 Filed plft's Mmoe in Oppo to Mtn for Judg on the Pldgs &/or for SJ—ws

11-24-76 Filed plf's Interrogs—w/s

12-7-76 Filed Plf Ward's Reply Brief to Government's Brief in Opposition to Ward's Mtn for Judgm on the Pleadings &/or S. J.

DATE	PROCEEDINGS

12-13-76 Filed Independent Petro. Assoc of Amer.'s mtn for lve of ct. to file brief amicus curiae

12-13-76 Filed Earl Salo's ltr to Mr. Hawks enclosing a copy of a Ct's decision dealing with the "sheen test", requesting that it be brought to the cts' attention. ws

12-22-76 Filed Memo Opinion & Order—that dfts' mtn for judgm on the pleadings or for s.j. is denied (Eubanks) w/s—zmc

1-21-77 Filed dfts' answers to interrogs w/s

4-1-77 JURY DOCKET: MONDAY, MAY 9, 1977—9:30 A.M.—EUBANKS

5-3-77 Filed 3 praes for & iss'd subps on behalf of L. O. Ward, for: Ernie Thomas, Jim Nay, Ray Pickle, Gary Sober, Curley Corwin, Bill Fisher, Rod Ylitalo

5-4-77 Filed prae for & iss'd 1 subp in blank on behalf of the plf

5-9-77 Filed Pretrial Order (Eubanks) ws

5-9-77 Filed Govt's PT Memo

5-9-77 Ent Jury Trial (Eubanks) zmc

5-10-77 Filed L.O. Ward's Req for Instr w/Judge's Rlgs thereon (Eubanks) ws

5-10-77 Filed Instructions to the Jury (Eubanks)

5-10-77 Filed Note from Jury w/Judge's Answer thereon (Eubanks)

5-10-77 Filed Jury's Interrog findings that oil did flow in a visible quantity from the "draw" on the L.O. Ward lease into Boggy Creek /s/Gary W. Chapman, Foreman

5-10-77 Ent Further Jury Trial; plt to prepare order; ct reduces the amt of penalty to $250.00 cnsl for dft to prepare order in 76-303 (Eubanks) zmc

5-13-77 Filed USM's Ret re Subps (8)

5-18-77 Filed Stephen Jones' ltr to Ct req'g a hrg date—ws

DATE	PROCEEDINGS

5-20-77 NONJURY: 6-13-77, 9:30 am (Eubanks)

6-7-77 Ent Order striking NJ of 6-13-77, to be reset on the next Civ NJ Dkt (Eubanks) zmc ws

8-2-77 NONJURY: 9-6-77, 9:30 am (Eubanks)

8-16-77 Filed USA's Mtn to Strike w/Brief in Sup—ws

8-22-77 Ent Order that the Mtn to Strike by USA is o/r & denied; the cases will remain on the dkt for the purpose of getting judgs settled in these cases (Eubanks) zmc ws

8-24-77 Filed Ct's ltr transmitting copy of Ct Reporter's portion of transcript of what transpired at Enid last spring (Eubanks) ws

8-30-77 Ent Order that such evid as the ptys desire to introduce re the constitutionality of 40 CFR 110.3(b), as enumerated in parag. 5C of the PT Order herein, will be heard on 9-6-77, 9:30 am (Eubanks) zmc ws

9-6-77 Ent Evid Hrg; ptys appear by cnsl, make opening stmts; plf Ward presents evid w/ test of witnesses, exhs admitted, plf rests; closing args; ct finds in favor of govt who is to prepare JE in ea case today (Eubanks) zmc

9-6-77 Filed dfts' Brief in Sup of the Invalidity of 40 CFR § 110.3(b) ws

9-6-77 Filed AND ENTERED Final Judgment—THAT dfts L. O. Ward and L.O. Ward Oil and Gas Operations are jointly & severally liable to the US for a civil penalty of $250. (Eubanks) (COB #122) (Clerk) (Copies to parties—zmc)

10-19-77 Filed Notice of Appeal of dfts from final jdgmt entered Sept 6, 1977 (record due in CCofA 11-28-77)

10-19-77 Filed Clk's ltr re service of notice of appeal, w/copy ltr & notice of appeal to counsel & CCofA and copy d.s. to CCofA

10-19-77 Filed dfts' Designation of Record—w/s

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Civil Case No. 77-1952

Appeal from the United States District Court
For the Western District of Oklahoma

598 F.2d 1187 (1979)

L. O. WARD, PLAINTIFF-APPELLANT

vs.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, RUSSELL E. TRAIN, individually and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS-APPELLEES

and

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

L. O. WARD and L. O. WARD OIL and GAS OPERATIONS, DEFENDANTS-APPELLANTS

OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, AMICUS CURIAE

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMICUS CURIAE

ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC., AMICUS CURIAE

MOUNTAIN STATES LEGAL FOUNDATION, INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES, and ROCKY MOUNTAIN OIL and GAS ASSOCIATION

ATTORNEYS FOR APPELLANT

(a) Stephen Jones (Ward)
Jones & Gungoll
P.O. Box 3339
Enid, Oklahoma 73701
(405) 233-4321

For Independent Petroleum Association of America

(a) Harold B. Scoggins, Jr.
1101 16th Street, N.W.
Washington, D.C. 20036
(202) 466-8240

ATTORNEYS FOR APPELLEE

For Okla. Independent Petroleum Assn. as Amicus Curiae

(a) Terry R. Doverspike
W. Bland Williamson
Pray, Scott, Williamson & Marlar
2910 Fourth National Bldg.
Tulsa, Oklahoma 74119
(918) 583-1366

For Energy Consumers & Producers Assn. Amicus

(a) Fred Gipson
P.O. Box 1641
Seminole, Oklahoma 74368
(405) 382-5555

For Mountain States Legal Foundation, et al:

Kea Bardeen

(a) James G. Watt
1845 Sherman Street
Denver, Colorado 80028
(303) 861-0244

DATE	PROCEEDINGS

11/22/77 Cause docketed; docketing statement, orig. & 9 cc.

11/30/77 Copy of Dist. Ct. order extending time to file record to 12/28/77.

12/3/77 Appearance—Appellant (Ward)—Jones

12/23/77 Record on apeal, Vol. I, II (pleadings) (686 pp.), Vols. III, IV (exhibit) (17 pp.), Vols. V, VI (transcript) (208 pp.), orig. (911 pp.)

12/19/77 Appearance—Appellee, Moorman, Strass, McCord

12/29/77 Order—Assigned to Calendar B—Appellant's brief due 1/19/78—Seth

1/16/78 Appellant's (Ward) motion for ext to 2/16/78 to file brief—Orig. only, Order: Appellant GRANTED to 2/16/78 to file brief—HKP—consl ntfd.

4/4/78 Mot of Okla. Independent Petroleum Assn. for leave to file brief amicus curiae w/consent, O & 13 cc, c/s (replaced by mot filed 4/5/78)

Brief of Okla. Independent Petroleum Assn. as Amicus Curiae, O & 13 cc, c/s (RECEIVED) (replaced by brief attached to mot filed 4/5/78)

4/5/78 Mot of Okla. Independent Petroleum Assn. for leave to file brief amicus curiae w/consent, w/brief attached, O & 13 cc, c/s, replacing mot filed 4/4/78 w/brief attached (to panel) BRIEF FILED 4/17/78

Appearance—Amicus Curiae—W. Bland Williamson, Terry R. Doverspike

4/14/78 Appellee (U.S.A.) mot for ext to 5/1/78 to file brief, O & 3 cc, c/s

Order—appellee (U.S.A.) GRANTED to 5/1/78 to file brief—HKP—cnsl notf

DATE	PROCEEDINGS

4/17/78 Order—motion for leave to file a brief amicus curiae by Oklahoma Independent Petroleum Association is granted; brief ordered filed as of 4/17/78—Lewis, McWilliams

Amicus' brief O & 25 cc, c/s (Energy Consumers & Producers Assn)

5/1/78 Appellee's (U.S.A.) mot for ext to 5/11/78 to file brief, O & 3 cc, c/s

Mot of Independent Petroleum Assn. for leave to file brief amicus curiae & for ext to 5/1/78 to file brief, O & 4 cc, c/s (to panel 5/3/78)

Brief of Independent Petroleum Assn. as amicus curiae, O & 4 cc

5/2/78 Order—appellee (U.S.A.) GRANTED to 5/11/78 to file brief—HKP—cnsl note

5/8/78 Order: Upon consideration, Independent Petroleum Association of America is GRANTED leave to file a brief amicus curiae. Brief is ordered filed as of May 1, 1978.

Appellees' consent to filing brief amicus curiae by Energy Consumers & Producers Assn, O only

5/15/78 Appellee's (U.S.A.) mot for ext to 5/22/78 to file brief, O & 3 cc, c/s

Order—appellee GRANTED to 5/22/78 to file brief. No further extension will be granted—RLH—cnsl notf'd

5/17/78 Appearance—Amicus Energy Consumers—Fred Gipson

5/30/78 Appellee's (USA) brief, O & 9 cc, c/s

6/2/78 Appellant's mot for ext to 6/30/78 to file reply brief, O & 3 cc

Order—appellant GRANTED to 6/30/78 to file reply brief—RLH—cnsl

6/8/78 Appellee's correction to brief, orig. & 9 cc.

DATE	PROCEEDINGS

6/12/78 Appearance—Independent Petroleum Association—Scoggins

6/23/78 Motion for leave to appear and file brief of amici curiae and leave to participate in oral argument, orig. & 9 cc, c/s (to

Amici Curiae brief, orig. & 9 cc., c/s (to panel 6/27/78)

6/28/78 Appellant's mot for ext to 7/15/78 to file reply brief, O & 4 cc

Order—appellant granted to 7/15/78 to file reply brief —RLH—cnsl

7/6/78 Order—Mountain States Legal Foundation, Independent Petroleum Association of the Mount States, Rocky Mountain Oil and Gas Association granted leave to file amici curiae brief; brief to be filed at 6/23/78; motion for leave to participate in oral argument denied without prejudice to right to renew motion when case is set for oral argument.—Lewis, McWilliams

7/19/78 Appellant's letter mot to file reply brief out of time, O only

Appellant's reply brief, O & 14 cc, c/s

Order—appellant granted leave to file reply brief out of time

2/16/79 HRG. SET Hearing set for March, 1979, Term—Denver, Colorado

2/27/79 M.PTP.ARG.F Amici's motion participate in oral argument file copies, c/s.

M.ADD.TM.ARG.F Amici's motion for additional time for oral argument filed, 4 copies, c/s.

2/28/79 M.PTP.ARG.SUB Amici's motion to participate in oral argument submitted

M.ADD.TM.ARG.SUBM Amici's motion for additional time for argument submitted (to panel).

DATE	PROCEEDINGS

3/5/79 M.ADD.TM.ARG.DISP. Granted Amici's motion for additional time for argument disposed of by Holloway

3/8/79 ADD.AUTH.F Appellee's additional authorities filed, 10 copies,

ADD.AUTH.SUBM Appellee's additional authorities submitted (to panel).

3/14/79 CS.ARG.SUBM—case argued and submitted—Holloway, Barrett, McKay

5/10/79 OPN.F—published signed opinion filed by Holloway, Barrett, McKay. Writing judge is Barrett.

JM.DISP—Judgment reversed and remanded by published signed opinion of Holloway, Barrett, McKay

5/24/79 SCOST. ISS. Issued statement of costs in favor of appellants against appellees in the amount of $65.00

6/1/79 MDT.ISS—Mandate issued to District Court

6-4-79 ROA.RMK. Letter re record sent to Judge Barrett

6-8-79 MDT.RCPT.F. Mandate receipt filed.

7/3/79 ROA.RTN.DC. Record on appeal returned to District Court (Vol. I-VI)

7-10-79 ROA.RCPT.F. Record on appeal receipt filed

9/13/79 P.WRIT.CERT.F—appellee's petition for writ of certiorari filed 9/7/79—Supreme Court No. 79-394

11/8/79 P.WRIT.CERT.DISP—petition for writ of certiorari granted order of Supreme Court 11/5/79

A-18

Copy to Enforcement: yes ✓ no ___

SPILL REPORT FORM

Oil and Hazardous Substances

R.L

Date: 4/2/75 Time: P.M.

Received by: D. Curtis

Case No.: E75-352

1. Person Reporting: Lou Ward

   Address: Ponca City Tel. No.: 237-55

2. Spiller: Lou Ward

   Address: P.O. Box 1187, Enid, Okla. 73701 Tel. No.: 405/234-3

3. Spill Location SE Sec 17 22N 6W, Garfield Co.
   Okla., Hwy 81 & Cutz, S.E. of Enid.

4. Spill Occurred: Date Late 3/28/75 Time ___

5. Spill Stopped: Date ~ 3/29/75 Time ___ On-Going ___

6. Water Body Affected: Tributary of Bugg Creek —
   250 yds and possibly Bugg Creek

7. Material Spilled: Crude Amount: est ~200 bbls

8. Source of Spill: #2 Blansit Lease - Well

9. Cause of Spill: pit overflow

10. Type Operation: Production - new well

11. Spill Contained: Yes ✓ No ___ Method: hay dam

12. Cleanup Started: Yes ✓ No ___ Finished: Yes ___ No ✓
    Date ~ 3/28/75 Date should by 4/3/75
    Method hay-scraper

13. Environmental Damage: None ___ Describe: unknown

14. State Notified: Yes ✓ No ___ Agency OCC & Health Dept.

15. SPCC Plan Prepared ? (new facility) and Implemented ___

16. Comments: Case closed.

17

Dec..

4/3/95 0930hrs - I called
Rod Vitale - Engineer for Lowland
Spill was cleaned up by 4/4/95. Some
preventive measures still in effect - to
keep more oil from getting into creek.

First well on lease was completed
in 1971.

They are currently trying to comply
with the SPCC Regs.

CERTIFIED MAIL: RETURN RECEIPT REQUESTED
(819436)

Lou Ward
Box 1187
Enid, Oklahoma 73701

Gentlemen:

The Environmental Protection Agency has received a report that your company was involved in the discharge of a harmful quantity of oil, estimated to be 840 gallons into waters of the United States, to wit: An unnamed tributary of Boggy Creek near Enid, Garfield County, Oklahoma on or about March 23, 1975 from a facility which you own (or operate).

The 1972 Amendments to the Federal Water Pollution Control Act (hereinafter, the "Act") prohibits the discharge of oil or a hazardous substance into or upon the waters of the United States in harmful quantities [33 U.S.C. 1321(b)(3)]. Any owner or operator of a vessel or facility from which oil or a hazardous substance is discharged shall be assessed a civil penalty by the Coast Guard of not more than $5,000 [33 U.S.C. 1321(b)(6)]. The definition of harmful quantities of oil appears in Title 40, Code of Federal Regulations, Section 110.3.

In order for this Agency to carry out its responsibilities under the Act, you are required under authority of Section 308 of the Act (33 U.S.C. Section 1318) to submit a letter of explanation including the specific information listed in Attachment A.

The letter of explanation must be submitted to: Mr. Ralph Corley, 1600 Patterson, Suite 1100, Dallas, Texas 75201, within fourteen (14) days of receipt of this letter. It must be signed by a duly authorized official of the corporation or company. The information submitted will be considered in evaluating whether the oil spill violated Section 311. [Please note that your reply in no way constitutes immediate notification of a spill to the appropriate Federal agency, as required by Section 311 (b)(5).] Section 309 of the Act (33 U.S.C. Section

1319) provides civil and criminal penalties for failure to submit information required under Section 308 and criminal penalties for knowingly making a false statement in any submission under Section 308.

6AEEL:RCorley:x2142:WPC:sh:AEEL-11:x3855:
5/13/75

6AEEL Benthul

[Illegible] 5/29/75

If you have any questions, please contact Ralph Corley, Attorney, Legal Branch, Enforcement Division, at (214) 749-2142.

Sincerely yours,

Original Signed by
James J. Doyle
Director
Enforcement Division

Attachment

ATTACHMENT A

The following information is submitted concerning F7S-652

1. Time and date of discharge: Time unknown, March 23, 1975.
2. Location of discharge, including:
   A. Name of Municipality and State: Enid, Oklahoma.
   B. Name and address of industry or commercial establishment at which the discharge occurred: L. O. Ward, Operator, Blansit #2 Well SL/4 Section 17-22N-6W, Garfield County, Oklahoma.
   C. Distance from receiving waterway: Estimated 100 yards.
   D. Name of receiving waterway, or first named waterway into which it flows: Boggie Creek.
3. Type of material discharged: Oil.
4. Quantity discharged: 20 bbl. or 840 gallons.
5. Quantity of material which eventually reached the receiving waterway, and date and time it was discovered: Estimated 5-15 bbl. (Approximately 10-15 bbl. recovered.) Discovered PM March 24, 1975.
6. Type of vessel or facility (Ship, Barge, Storage Tank, Tank Truck, etc.) in which the oil was originally contained: Open earth working pit. (Pits used during drilling operations.)
7. Describe in detail what actually caused the discharge: Oil had been produced during a short isolated test from a second zone in the well. The test volume of oil remained in the working pit for 90 days after the completion crew had been released. Unusually high rainfalls, accompanying extremely turbulent weather filled the pits and caused overflow which floated down

to the run off tributary. Company personnel were unaware, at the time, of pit filling due to the unaccessable location during the inclement weather.

8. Name and address of owner of facility causing the discharge:

   L. O. Ward, Operator et al
   Box 1187, Enid, Oklahoma 73701

9. Name and address of operator of facility causing the discharge: Same as above.

10. Describe damage to the environment: Environment affected was Native Grass. No damage to the vegetation or other environment. Vegetation is growing as normal.

11. Described steps the above named owner or operator took to clean up the spilled oil and dates and time steps were taken: March 24. Upon discovery of the spill, teams of men were immediately dispatched to the spill area. Outside help was employed along with company personnel. They employed barriers made of wood and straw, plus tank trucks to pick up any available free oil. The oil soaked straw and alfalfa were transported from the area for separate containment. This activity lasted for three days. For several days straw and alfalfa dams were replaced daily to insure all oil being retrieved. Then a power wash unit was employed to wash residue which adhered to the grass and bruch. This fluid was also picked up. It was later advised we burn any residue debris. The clean operation was successful in full restoration of the area.

12. Action by company to mitigate damage to the environment: See 11. above.

13. Measures taken by your company to prevent future spills: The pits were filled with a dozer. Straw and absorbents are stored for emergency use. Dikes are being used in facility to restrain migration.

14. Was water flowing into receiving waterway during spill or clean-up?: Yes, Boggie Creek is a continuous flowing body of water.

15. List the Federal and State Agencies to which the owner or operator named in 8. and 9. above reported this discharge:

Agency	Location	Official
EPA, Federal Agency	Dallas, Texas	David Curtis
Oklahoma Corp. Comm. State of Oklahoma	Kingfisher, Oklahoma	Lloyd Barrier
City of Enid, Oklahoma	Enid, Oklahoma	Monty Montgomery
County Health Dept. Garfield County, Oklahoma	(see attached letter)	

16. List the names and addresses of persons you believe have knowledge of the facts surrounding this incident:

Curly Corwin 2135 Sundown Circle Enid, Oklahoma	Bill Fisher 1310 Gannon Enid, Oklahoma	Rod Ylitalo 138 Margaret Circle Enid, Oklahoma

Submitting this report does not constitute an acknowledgement of violation of any rules, regulations or laws of the Environmental Protection Agency. The undersigned believes the occurrence was unfortunate, but that the quantity involved did not constitute a hazardous material. The undersigned also believes that the incident was handled prudently and responsibly.

The above answers are true to the best of my knowledge and belief.

Date of Signature: [illegible]

Signature of person completing this report
/s/ [L. O. Ward]

Case No.: F7S-652

[SEAL]

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION VI
1600 Patterson
Dallas, Texas 75201

[Received Aug. 15, 1975]

Commander J. D. Webb (MEP)
Second U.S. Coast Guard District
Federal Building
1520 Market Street
St. Louis, Missouri 63103

Re: Our File F75-652

Dear Commander Webb:

Transmitted herewith is evidence which documents violation of 33 USC 1321(b)(3) by L. O. Ward, Box 1187, Enid, Oklahoma 73701. We request that a civil penalty be assessed against L. O. Ward pursuant to 33 USC 1321 (b)(6).

The alleged violation resulted from an oil spill into Boggie Creek, Garfield County, Oklahoma, on or about March 23, 1975. Approximately 10 barrels of oil were discharged into Boggie Creek. All information transmitted herewith was submitted by discharger pursuant to 33 USC 1318.

We recommend that a civil penalty in the range of $500 to $1000 would be appropriate for this spill. Our recommendation is based upon an evaluation of the gravity of the violation, an assumption that a penalty with the suggested range will not have a significant effect upon L. O. Ward to continue in business, and upon our judgment that such a penalty is appropriate considering the size of the company.

Please keep this office advised of the progress of this case. If you need assistance or additional information,

please contact Mr. Ralph Corley at (214) 749-2142 in Dallas, Texas.

Sincerely yours,

/s/ Harless R. Benthul
HARLESS R. BENTHUL
Chief, Legal Branch
Enforcement Division

Enclosure(s)

[SEAL]

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Mailing Address:

U.S. Coast Guard (G-LMI/81)
Washington, D.C. 20590
Phone: 202-426-1527
5830/5-2

11 Feb. 1976

[Rec'd Feb. 16]

Jones & Gungoll
Attention: Stephen Jones, Esq.
P.O. Box 3339
Enid, Oklahoma 73701

Gentlemen:

The Commander, 2nd Coast Guard District, St. Louis, Missouri, has forwarded the file in Penalty Case No. 2P50770, including your appeal on behalf of Mr. L. O. Ward, owner of the oil drilling facility involved. The appeal is from the action of the District Commander in assessing a penalty of $500.00 against the company under the authority of section 1321(b)(6) of Title 33, U.S. Code (section 311(b)(6) of the Federal Water Pollution Control Act) for violation of section 1321(b)(3) which prohibits the discharge of oil in harmful quantities into or upon the waters of the United States. The assessment was based on the finding that a harmful quantity of oil, estimated at 840 gallons was discharged from the facility into Boggie Creek, Garfield County, Oklahoma, on 23 March 1975. The discharge occurred when a oil drilling facility overflowed during a heavy rainfall. Your appeal is denied for the reasons stated below.

First, you contend that the statute upon which the proceeding is based and the requirement to submit a written statement to report a discharge is unconstitutional.

You further argue that the penalty assessed is contrary to the weight of the evidence and that the penalty is excessive.

The constitutionality of various provisions of the Act is not, of course, a matter which can be decided by the Coast Guard.

It is the mandate of Congress as expressed in the Federal Water Pollution Control Act that there shall be no discharges of oil into or upon the waters of the United States. The Act provides that a penalty of not more than $5,000.00 shall be assessed against the owner or operator of any vessel or facility from which oil is discharged in harmful quantities. The statute requires that the following factors be considered in determining the amount of the penalty to be assessed: the appropriateness of the penalty to the size of the business of the owner or operator; the effect on the owner's or operator's ability to continue in business; and the gravity of the violation. It is not necessary to find intent or negligence, as the law prohibits *any* discharge of a harmful quantity of oil.

In all oil pollution incidents it is incumbent upon the person in charge to immediately notify the Coast Guard of such discharges. A failure to do so is a criminal act subjecting such persons (which includes an individual, firm, corporation, association or partnership), to a fine of not more than $10,000.00 or imprisonment for not more than one year, or both.

It is felt that there is sufficient evidence shown in the record to warrant the penalty assessed in this case. The entire record has been reviewed and the penalty assessment is considered fair and reasonable.

To carry out the intent of the law it is the policy of the Coast Guard to assess a penalty at or near the maximum unless a lesser penalty is clearly justified. I have reviewed the arguments raised in your appeal and find that proper consideration has been given to the applicable

provisions of law in evaluating the facts in this case. The assessed penalty of $500.00 is approved.

The penalty of $500.00 is due and must be paid within 30 days from the date of receipt of this letter. Payment should be made by check or money order payable to the U.S. Coast Guard and forwarded to the Commander, 2nd Coast Guard District (d1), Federal Building, 1520 Market Street, St. Louis, Missouri 63103. Failure to make payment within the period prescribed will result in the case being forwarded by the District Commander to the U.S. Attorney for appropriate action.

Sincerely,

/s/ R. A. Ratti
R. A. RATTI
RADM, U.S. Coast Guard
Chief Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKALHOMA

[Filed May 9, 1977]

No. CIV-76-0303-E

L. O. WARD, PLAINTIFF

vs.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation, et al., DEFENDANTS

No. CIV-76-0456-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

L. O. WARD and L. O. WARD
OIL and GAS OPERATIONS, DEFENDANTS

PRE TRIAL ORDER

As a result of the pre trial conference held herein, where Plaintiff was represented by Stephen Jones and the Defendant United States of America by Richard Campbell, their attorneys of record, the following issues of fact and law were framed, stipulations made, and other matters considered and ordered as follows:

1. The contentions of the United States of America are as follows:

A. On or about March 23, 1975, an estimated twenty barrels (840 gallons) of oil and drilling mud overflowed from an open earth pit at a drilling site owned and operated by L. O. Ward near Boggy Creek, Garfield County, Oklahoma. That a harmful quantity of oil and drilling mud, approximately ten barrels, flowed from the

discharge site into Boggy Creek, Garfield County, Oklahoma.

B. Boggy Creek is a navigable water of the United States within the meaning of 33 U.S.C. § 1362(7).

C. That the aforesaid discharge was a violation of 33 U.S.C. § 1321(b)(3).

D. That the United States Coast Guard through Commander J. D. Webb assessed an appropriate and reasonable fine against L. O. Ward in the nature of a penalty and that said Commander Webb reviewed all of the material in his file in order to consider the size of Defendant's business, the affect of the penalty on Defendant's ability to continue in business and the gravity of the violation.

E. L. O. Ward has not paid the $500.00 civil penalty imposed by Commander J. D. Webb after due demand has been made.

2. L. O. Ward's contentions are as follows:

A. That the provisions of 33 U.S.C. § 1318(a)(4)(A)(ii), 33 U.S.C. § 1319(c)(1), 33 U.S.C. § 1321(b)(5)(6) and 40 C.F.R. § 110.1(L) and 110.4(b) are unconstitutional as being violative of the Fifth Amendment of the United States Constitution.

B. Boggy Creek is not a navigable stream within the meaning of the Act.

C. Acting pursuant to the above mentioned statutes, L. O. Ward submitted to the Environmental Protection Agency, and its agents, a written report of the alleged oil spill. Said report being prepared and filed pursuant to the provisions of 33 U.S.C. § 1318(a)(4)(A)(ii).

D. The only material furnished to the Coast Guard and the only basis upon which the penalty was determined against Mr. Ward was the material that Ward had previously submitted to the United States Environmental Protection Agency as outlined above.

E. That the statutes and procedures relied upon by the United States of America and the Defendants in case number CIV-76-0303 are violative of the Fifth Amendment to the Constitution of the United States.

F. That the spill was caused by an act of God or other acts beyond the control of L. O. Ward and that no

penalty should be assessed against him on the grounds that Ward is without fault in the premises.

G. That upon notice of the spill Ward undertook all proper steps to remove oil from water, prevent it from going to a navigable stream and otherwise safeguard the surrounding environment.

3. Admitted facts:

A. The identification of the parties, the venue, jurisdiction, residence, and citizenship is admitted except that William Coleman is no longer Secretary of Transportation but that the position has been filled by the Honorable Brock Adams.

B. L. O. Ward is engaged in a business operation as an independent oil and gas producer with his place of business at 1420 Lahoma Road, Enid, Oklahoma.

C. On or about March 23, 1975, a drilling facility owned and operated by L. O. Ward sustained a discharge of oil.

D. Thereafter, notification was made of the spill to the United States Environmental Protection Agency by L. O. Ward or his agents. On or about June 24, 1975, Ward submitted to the Environmental Protection Agency and its agents a written report of the alleged oil spill. Said report was prepared as required by law.

E. Thereafter, on August 15, 1975, agents of the Defendant Train, acting pursuant to law, notified J. D. Webb, Commander, Second United States Coast Guard District, in St. Louis Missouri, of the alleged violation by Ward of 33 U.S.C. § 1321(b)(c). The United States Environmental Protection Agency, headed by the Defendant Train, and acting pursuant to his directions, requested of the Coast Guard that a civil penalty be assessed against the Plaintiff L. O. Ward pursuant to 33 U.S.C. § 1321(b)(6).

F. On December 19, 1975, Commander J. D. Webb acting on behalf on the Commandant of the Coast Guard assessed a penalty of $500.00 against L. O. Ward because of a finding of a violation of 33 U.S.C. § 1321(b)(3).

G. Thereafter, L. O. Ward notified J. D. Webb of his desire to appeal and the appeal was subsequently denied.

H. At all material times herein, L. O. Ward has asserted as a defense that the statute upon which the proceedings were based is unconstitutional, that the requirement that he submit a written statement to report any violations was unconstitutional and that the penalty of $500.00 was contrary to the rate of the evidence and the imposition was unconstitutional.

I. L. O. Ward exhausted all administrative remedies prior to the filing of this suit.

4. Was the spill which occurred on March 23, 1975, the result of negligence by L. O. Ward or his agents and servants or was it caused by events beyond his control and/or an act of God.

B. Did a harmful quantity of the discharge reach Boggy Creek, Oklahoma.

C. The amount of the fine to be imposed, if any.

5. Contested issues of fact and law to be determined by the Court:

A. Boggy Creek is a tributary of Skeleton Creek which is a tributary of the Cimarron River which is a tributary of the Arkansas River.

B. Are the statutes and procedures set forth above and relied upon by the United States of America and the Defendants in CIV-76-0303 violative of the Constitution of the United States of America.

C. Are the provisions of 40 C.F.R. 110.3(b) which provides in part that a discharge of oil which causes a "film or sheen or discoloration of the surface of the water" constitutes a harmful quantity, arbitrary, unfair, capricious, and contrary to the intent of the Congress, and therefore, an unreasonable exercise of the delegated power and inconsistent with 33 U.S.C. § 1321(b)(6) and in violation of the Constitution of the United States of America.

6. The parties are directed to exchange witness lists by May 2, 1977, and the same is to be part of the pre trial order as though fully copies at length herein. The parties are to furnish the Court requested instructions and trial briefs by May 5, 1977. All discovery is to be completed by May 5, 1977. This matter is ordered for

trial on the civil jury docket beginning May 9, 1977, at 9:30 A.M. in the United States Courthouse at Enid, Oklahoma, 115 West Broadway.

7. All exhibits to be introduced are to be marked in advance and to be available for inspection by opposing counsel at least six days before the trial date: to wit, May 3, 1977. The exhibits of all parties thus marked and produced for inspection may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Should either party object to stipulating to authenticity and identification of the exhibit, it will notify the other party at least five days before trial in writing: to wit, May 4, 1977.

The foregoing pre trial order has been approved by both parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings passed out of the case and the issues as joined herein be the issue to be tried, and this pre trial order shall not be amended, except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated in Oklahoma City, this 6 day of May 1977.

/s/ [Illegible]
United States District Judge

Approved as to form:

/s/ Stephen Jones
STEPHEN JONES
Attorney for Plaintiff

/s/ Richard Campbell
RICHARD CAMPBELL
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil No. 76-0456-E

Consolidated

[Filed Sep. 6, 1977]

L. O. WARD, PLAINTIFF

—*vs.*—

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, RUSSELL E. TRAIN, individually and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS

Civil No. 76-0303-E

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

L. O. WARD & L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS

FINAL JUDGMENT

The United States seeks to collect a $500 penalty which has been administratively assessed against L. O. Ward by the United States Coast Guard pursuant to 33 U.S.C.

§ 1321(b)(6) for an alleged discharge of oil into navigable waters. The Court has already found that the penalty imposed was civil in nature, that the self-reporting provision of 33 U.S.C. § 1321(b)(5) does not violate the Fifth Amendment's protection against self-incrimination, that the imposition of a penalty after notice and hearing withstands constitutional attack, and that the definition of "harmful quantities" of oil at 40 C.F.R. § 110.3 is a valid regulation under 33 U.S.C. § 1321(b)(4). *Ward* v. *Coleman*, 423 F.Supp. 1352. The case was tried to a jury on May 10, 1977.

The parties had stipulated that a facility owned and operated by Ward sustained a discharge of oil on or about March 23, 1975. At trial, the following additional facts were established by undisputed testimony. The discharge resulted when the entire contents of a shale pit connected to Ward's drilling operations drained out. Some of the oil reached a small draw near the shale pit. Some of the oil flowed down the draw, and some was deposited on the banks of the draw, and on vegetation in the draw. The draw flows in a northerly direction, and enters Boggy Creek at a point approximately 2000 feet north of the point where the oil entered the draw. Some of the oil flowed at least as far as a point about 100 feet from the confluence of the draw with Boggy Creek. Although defendants' witnesses denied that any oil reached Boggy Creek, the Court concluded that the jury could reasonably find that oil in a harmful quantity[1] did reach Boggy Creek. The Court submitted an interrogatory to the jury. In response, the jury found that oil did flow in a visible quantity from the draw into Boggy Creek.

The parties had stipulated that Boggy Creek is a tributary of Skeleton Creek, which is a tributary of the Cimarron River, which is a tributary of the Arkansas River. The Court takes judicial notice that the Arkansas River is navigable in fact. The Court concludes that

[1] "Harmful quantity" has been administratively defined to include discharges which ". . . cause a film or sheen or discoloration of the surface of the water. . .", 40 C.F.R. § 110.3(b).

boggy creek is a navigable water of the United States for the purposes of the Federal Water Pollution Control Act, pursuant to 33 U.S.C. 1362(7). *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (C.A. 6, 1974); *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz., 1975).

The Court concludes that Ward is liable for a civil penalty under 33 U.S.C. § 1321(b)(6), inasmuch as he is the owner and operator of an onshore facility from which oil was discharged in harmful quantities into the navigable waters of the United States.

The penalty to be imposed is a question for the Court. *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 438 (C.A. 2, 1974); *United States* v. *ITT Continental Baking Co.*, 485 F.2d 16, 21 (C.A. 10, 1973). The Court received evidence on two matters that it found relevant to the reasonableness of the penalty assessed by the Coast Guard. First, there was evidence concerning the cause of the discharge. This evidence was inconclusive. Second, there was undisputed testimony that Ward had his employees and independent contractors conduct clean-up operations beginning on March 25, 1975.[2] The Court finds that the cause of the spill is unknown, and that Ward's clean-up operations were good, and that $500 is therefore an excessive penalty. The Court therefore reduces the penalty to $250.

The Court granted Ward's request for a second hearing, over the objections of the United States. At that hearing, the Court received evidence on the harmful effects of oil on domestic animals, wildlife, aquatic life and vegetation. Two expert witnesses called by Ward denied that the mere presence of a sheen could establish that an oil discharge was toxic. One of these witnesses also stated, however, that a quantity of oil that produced a rainbow sheen might have a harmful effect on aquatic life. The evidence also showed that the presence of a sheen demonstrated that a finite amount of oil had been

[2] The Government objected that evidence of Ward's clean-up operations was irrelevant to the size of the penalty, citing *United States* v. *W. B. Enterprises*, 378 F.Supp. 420, 422 (S.D.N.Y., 1974).

discharged, and that the minimum amount spilled could be determined from the size and appearance of the sheen. Finally, the evidence showed that it would be administratively unworkable to require that every discharge of oil be scientifically analyzed before it could be deemed "harmful" for the purposes of 33 U.S.C. § 1321. The Court therefore reaffirms its conclusion that the definition of harmful quantities at 40 C.F.R. § 110.3, and in particular, the "sheen test" at 40 C.F.R. § 110.3(b), are lawful and constitutional. *United States* v. *Boyd*, 491 F.2d 1163 (C.A. 9, 1973); *United States* v. *Chevron Oil Co.*, 9 ERC 1503 (E.D. La., 1976).

IT IS THEREFORE ORDERED AND ADJUDGED that defendants L. O. Ward and L. O. Ward Oil and Gas Operations are jointly and severally liable to the United States for a civil penalty of $250.

/s/ Luther B. Eubanks
United States District Judge

APPROVED AS TO FORM:

/s/ Earl Salo
EARL SALO
Attorney, Department of Justice
Washington, D.C. 20530

/s/ Stephen Jones
STEPHEN JONES
Attorney for L. O. Ward
P.O. Box 3339
Enid, Oklahoma

UNITED STATES COAST GUARD
23 FEB 1973

COMMANDANT INSTRUCTION 5922.11A

Subj: Pollution Law Enforcement

1. *Purpose.* This instruction promulgates guidance for the assessment of civil penalties pursuant to Section 311 (b) (6) of the Federal Water Pollution Control Act (FWPCA).

2. *Cancellation.* Commandant Instruction 5922.11 is cancelled.

3. *Discussion.*

a. It is Coast Guard policy that every reported or discovered discharge of oil be investigated and that every discharge in violation of Section 311 (b) (6) result in the assessment of a civil penalty.

b. In cases with extenuating circumstances, mitigation may be considered upon review and a compromise amount agreed upon. In those cases, the assessed penalty will become a matter of record as well as the compromise action taken.

c. In determining the amount of a penalty, only the factors set forth in the Act shall be considered. In this way, it is anticipated that the general level of penalties will be raised to a more meaningful level.

4. *Action.*

a. Enclosure (1) shall be used as the guideline for the assessment of a civil penalties pursuant to Section 311 (b) (6), FWPCA.

b. Information contained herein is intended to be used in conjunction with the National Contingency Plan as implemented by COMDTINST 3020.3 series.

/s/ J. D. McCann
J. D. McCANN
Acting Chief
Office of Marine Environment
and Systems

Encl: (1) Coast Guard policy for the application of Civil penalties under Section 311 (b) (6), FWPCA

Enclosure (1) to COMDTINST 5922.11A
23 FEB 1973

COAST GUARD POLICY FOR THE APPLICATION OF CIVIL PENALTIES UNDER SECTION 311 (b) (6), FWPCA

Consistent with the language of the Federal Water Pollution Control Act, Coast Guard policy requires the assessment of a civil penalty for each discharge of oil in violation of Section 311 (b) (3). A maximum penalty of $5,000 is authorized by Section 311 (b) (6); however, the drafters of the Act envisioned lesser penalties in certain circumstances. Section 311 (b) (6) provides that, "In determining the amount of the penalty . . . the appropriateness of the penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered . . ." That is to say that the penalty might be less than $5,000 for a small business, for a business which would be forced out of operation by the maximum penalty, or for a violation of minor gravity. It should be noted, however, that these factors are not to be considered in determining whether a discharge should be investigated or whether a penalty should be assessed. The statute requires that a civil penalty be assessed for each violation of Section 311 (b) (3).

It is Coast Guard policy to assume that the penalty will be at or near the maximum unless a lesser penalty is clearly justified by one of the factors listed in Section 311(b)(6).

A number of considerations may be made in determining the gravity of a violation, such as the degree of culpability associated with the violation, the prior record of the responsible party, and the amount of oil discharged. Substantial intentional discharges should result in severe penalties, as should cases of gross negligence, and so on. This is not to suggest that other considerations may not combine to determine the gravity of a violation.

Two factors should not be considered in fixing the amount of a civil penalty: (1) the responsible party's removal effort or expense and (2) a decision by Federal and/or state authorities to bring criminal action for the same discharge. Liability for a civil penalty under Section 311(b)(6) attaches at the time of discharge. It is entirely unrelated to the subsequent removal responsibility for which the discharger must bear the expense, either directly or by reimbursing the Pollution Fund. In no case may a responsible party avoid or reduce a civil penalty by removing the discharged oil. Federal or state criminal prosecutions for the same discharge do not affect the imposition or amount of a civil penalty. Criminal prosecutions are brought under separate authority such as the Refuse Act of 1899. They are neither intended as substitutes for civil penalties nor do they create a legal bar to subsequent civil penalties. Civil penalties should, therefore, be assessed for all violations of Section 311(b)(3) without regard to pending or anticipated criminal action.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-76-0303-E

Consolidated

L. O. WARD, PLAINTIFF

vs.

WILLIAM G. COLEMAN, JR., ET AL., DEFENDANTS

&

Case No. CIV-76-0456-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

L. O. WARD & L. O. WARD OIL & GAS OPERATIONS,
DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE
HONORABLE LUTHER B. EUBANKS

UNITED STATES DISTRICT JUDGE,
AND A JURY

ON MAY 9TH, 1977

IN ENID, OKLAHOMA

Reported by:

KEN COURTEMANCHE, C.S.R.

APPEARANCES

JONES & GUNGOLL, Attorneys and Counsellors at Law, P.O. Box 3339, Enid, Oklahoma, 73701, BY: MR. STEPHEN JONES, appearing on behalf of the Plaintiff in Case No. CIV-76-0303-E and appearing on behalf of the Defendant in Case No. CIV-76-0456-E.

MR. EARL SALO, United States Attorney, Department of Justice, Washington, D.C., 20530, appearing on behalf of the Defendant in Case No. CIV-76-0303-E and on behalf of the Plaintiff in Case No. CIV-0456-E.

* * * *

[43] THE COURT: If you want the exhibits all received at this time, we'll do it, or as you need them, at your election.

[44] MR. JONES: We have no objection to his exhibits and I believe he has none to ours, as to identification and authenticity.

THE COURT: What are the numbers of them, could you give us those?

THE CLERK: Plaintiff's 1 and 2 and Defendant's 1 thru 7.

MR. JONES: May I have just a minute, Your Honor?

THE COURT: Yes.

MR. JONES: Your Honor, we have no objection to the identification and authenticity of Plaintiff's 1, but because of the issues previously raised, which the Court is familiar with, involving the Fifth Amendment, we object to Plaintiff's Exhibit 1 on the grounds that it's in violation of the self-incrimination clause in that this is a criminal count—or civil count.

THE COURT: Very well. Let me make this observation to the Jury: I'm going to receive the evidence over the objection of the Defendant and at the same time conceding that in my opinion it's a very, very close question. That's a matter to be ruled on in connection with the Pretrial Motions, in order to protect his record, and to keep his position consistent, Mr. Jones must object to it.

MR. JONES: I have no objection to the other exhibits.

THE COURT: Fine. Government's Exhibits 1 and 2 will [45] be received. The Defendant's Exhibits 1 thru 7 will be received into evidence. Go ahead, Mr. Salo.

GARY SOBER

called as a witness on behalf of the Government, after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. SALO:

Q Would you state your full name, please?
A Gary Sober.
Q Where do you live, Mr. Sober?
A Right now I live in Edmond.
Q Could you give the address for the record?
A 3577 Wagonwheel Road.
Q All right. Where do you work, Mr. Sober?
A I work for the Oklahoma State Department of Health, Water Quality Division.
Q Do you have a title? A position?
A I guess it would be a Sanitarian or Environmental Technician.
Q All right. Do you have some degrees that qualify you for that position?
A I have a BS degree from Oklahoma State University.
Q In what subject?
A Wildlife Management and Zoology.
[46] Q When did you earn that?
A 1969.
Q And, do you have another degree?
A I have a Master's in Fisheries.
Q Fisheries?
A Yes.

Q Where did you earn that?
A At Oklahoma State.
Q What year did you receive that degree?
A '73, I believe.
Q All right. How long have you been working for the State Department of Health?
A I started in March of 1974.
Q All right. Could you describe your duties working for the State Department of Health?
A Well, when I was assigned to Garfield County, I was assigned as a Sanitarian, and my duties covered the field of water, air, solid waste, food, restaurant type inspections, we had some thirty-something programs that we cover here in the County.
Q All right. Now, have your duties included investigating spills of harmful substances into the water?
A When we are—When we are notified of these, our duties were to investigate these types of spills.
Q All right. Now, if I can take you back to March of [47] 1975, where were you assigned at that time, to work?
A I was in Garfield County, assigned to Garfield County.
Q All right. On March 25 of 1975, did you happen to observe an oil spill?
THE COURT: Excuse me, just a minute, Mr. Salo. Mr. Cloudd, you're the fartherest away, can you hear the witness all right, is he speaking all right?
JUROR CLOUDD: Yes.
THE COURT: Very well; go ahead.
Q (By Mr. Salo) On March 25 of 1975, did you happen to observe an oil spill as part of your work?
A March 25 of '75?
Q That's right.
A Yes.
Q Okay. Could you describe to the Jury how you happened to observe that spill?
A I was out at the Enid Landfill doing a routine inspection of the sanitary facilities. We have to do so many a year to check out on the program to see if they're putting their waste in right and covering it up and

there is a part that's open to the public where they have —they have really divided into two parts, one part for the City refuse and another part for people cleaning out their garages, or whatever, and take it over and dump it into this other part. As I was over there to check upon the clean-up operations and see how [48] much trouble they were having, and I noticed an oil tank car in an oil pit, just down to the South of this particular area, and there was some oil on the ground and I went down there further to investigate and this is where I first saw the spill. When I—When I confronted the man who—When I first saw the spill, I thought it was—that it was from maybe—maybe they were changing the oil from their heavy equipment out there and putting it into this site, and I went and approached the man who was in charge of the operation and I asked him about this and he told me that it was not his site and the City didn't have anything to do with it.
Q What man was that that you spoke to?
A This was Nolan Rich. I believe he's the Director out there, he's still out there, I believe.
Q All right. Can you describe now the spill that you saw?
A Well, it was coming out of the dike. I don't know how many of you are familiar with this type of oil retention pit, but if—It was probably eight to ten feet across and twenty-thirty foot long and they usually have—most of them generally have—you have a three foot above the level of the liquid in there to maintain, you need to maintain this level to keep the runoff and things in case you get a large amount of rain, to keep it from falling out. Well, this dike had—I noticed when I approached it on the East end of it, there was [49] more or less a V-notch cut in the top and it was about a foot, maybe a foot and a half deep, where it looked like somebody had taken something and cut the top of it out. You find this type in certain areas where they use—skim the top layer of water off and retain other things like if you have a sedimentation pond, a

lagoon system, domestic type waste. I noticed this because it was cut in such a way that it looked like it was done mechanically, and this is what brought me up to follow the trail of oil out of this site.

Q All right. So, you say there was a trail of oil leading from that notch?

A There was no oil flowing, there was oil-soaked ground, oil soaked in the ground where it had flowed out.

Q Did you follow that?

A I followed it down to this little creek. Well, it really—It was flowing water that was flowing down—As Mr. Jones says, it's a gully, but there was flowing water in this gully.

Q All right. How far was it from the pit down to the gully?

A Fixty, sixty feet, maybe more, it's really hard to say, hard for me to give an exact number.

Q All right. Did you observe any oil in the gully itself?

A Well, there was—Like I say, there was water flow-[50] ing through the gully at this time and there was oil at various points down the gully.

Q Was the oil on the surface of the water?

A There was oil on the surface of the water, also oil on some of the vegetation and plants surrounding it.

Q Did you follow the gully to see how far the oil went?

A Yes, we followed the gully and the course it took and there is areas where there might be a little buildup of water and there was oil there and you could follow it all the way on down into the creek.

Q That's into Boggy Creek?

A Yes, into Boggy Creek.

Q All right. Did you see signs of oil as far down as Boggy Creek?

A Yes, there was oil that was in Boggy Creek, in certain areas of Boggy Creek.

Q Did you see that on the surface of the water in Boggy Creek?

A You could see it on the surface of the water and there was some, oh, tree limbs and stuff like this that were in the Creek that had oil on it, and there was some oil on the sides of the bank.

Q All right. Did you follow Boggy Creek then to see how far the oil went?

A Yes, we followed Boggy Creek down to Sixteenth Street [51] and the oil ran out before Sixteenth Street. There was no signs of oil any farther than Sixteenth Street.

Q All right. Now, do you have anyway of knowing if earlier there had been signs of oil further down on Sixteenth Street?

A No.

Q All right. When you were investigating this path of oil, did you see any signs of salt that would have been deposited with the oil?

A It would be hard to say if—It would be hard to say, it was definitely from that.

Q Did you see salt at this time on March 25?

A There was a few places there that did show some salt deposits, but you couldn't—you couldn't bring any connection in—I couldn't tell where they came from.

Q I see. Could you describe the oil that we are talking about, could you be at all specific about how it looked?

A Well, to me it looked like waste oil, like after you would change the oil in your car and put it out somewhere, oil—It didn't have the dark color characteristics of crude as far as being raw crude oil, but it had characteristics of being oil that was—oh, diluted with water, you know, oil that has water in it and it would be sort of a milkier type of color than just what regular raw crude would be.

Q All right. Now, in your work for the Health Depart-[52]ment, do you regard spills of oil like the one you have just described as being harmful to the environment?

MR. JONES: I object to that as leading and suggestive and no proper foundation laid and the witness not qualified to answer such a question and is beyond the scope of the fact in this case.

THE COURT: Well, I think you may further qualify him in that regard, Counsel, but I will sustain it at the moment.

MR. SALO: All right.

THE COURT: On the basis that the witness has not been qualified.

MR. SALO: All right.

THE COURT. As an expert in that particular area.

Q (By Mr. Salo) Is it part of your job or has it been part of your job with the Health Department to do reports on spills of oil and other harmful substances?

A We get called in on various spills of what we call hazardous substances, whether it be acid or pesticides, oil, salt water type spills, cattle feedlot runoff, stuff like that. We get called in and usually our office is no more than an investigating type body that calls in other agencies and this is really all that we do, is go out and notify the people that these things have happened. As far as fish kills and stuff like this, the Wildlife Department was notified on these particular instances.

[53] Q In the academic work you did to earn your two degrees, did your studies include studying the effect of pollutants on fish or vegetation?

A My studies did not include any courses directly related to effects of pollution on fish. They were mainly in culture and environmental aspects.

Q All right. Have you had the chance to investigate oil spills where there were fish kills?

A Yes, I have.

Q So, are you familiar with the effect that oil and substances that are discharged with oil, the effects they have on fish, for example?

A Yes, in certain situations, I am.

Q All right. Could you explain what some of the effects of oil spills into water are?

MR. JONES: If the Court please, I'm going to object to that unless it can be shown that such effects were present here or unless there is something about Boggy Creek, detective water from the Atlantic Ocean to the Gulf of Mexico or the Great Lakes—That's too broad a

question, is the basis of my objection. It's not properly framed for the facts of this case.

THE COURT: Would you rephrase it, Counsel?

Q (By Mr. Salo) All right. Well, did you see any specific harmful effects of this oil spill on either—on [54] vegetation, for example?

A There was—I observed no fish kill.

THE COURT: Well, he said vegetation.

THE WITNESS: Vegetation.

THE COURT: That was his inquiry, did you see any harmful effect on vegetation?

THE WITNESS: Harmful effects on vegetation. You would have to go with—a long-lasting effect or a temporary effect or what? There were no long-lasting effects, harmful effects on the vegetation.

Q (By Mr. Salo) All right. Now, you told us how you followed the oil, evidence of it as far down as Sixteenth Street. In your experience in investigating oil spills, will some of the oil continue on down the stream and yet remain undetected?

MR. JONES: If the Court please, that's too broad a question. It assumes facts not in evidence and I think we are entitled to know what did happen, not what might have happened in the absence of other evidence.

THE COURT: I think he may show what he saw, tell the Jury, go ahead, what you saw.

THE WITNESS: Like I say, I had—past Sixteenth Street, I observed no oil on either the banks, vegetation or any types of debris, other debris that was in the Creek, so I cannot say that it went on down or it didn't.

[55] Q (By Mr. Salo) All right. Now, I would like to show you this document which is marked Plaintiff's Exhibit 1. Have you seen that document before?

A Yes.

Q Could you tell us what it is?

A It's a report that Mr. Ward filled out to send to the Environmental Protection Agency.

Q Is that the report on the spill that you have been describing for us?

A Yes.

MR. SALO: All right. I have no more questions, Your Honor.

THE COURT: You may cross examine, Mr. Jones.

* * * *

[69] THE COURT: So, we'll hear the Defense witnesses now. You may call your first witness for the Defendant.

MR. JONES: The Defendant calls Curly Corwin.

B. V. CORWIN

called as a witness on behalf of the Defendant, after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

DIRECT EXAMINATION

QUESTIONS BY MR. JONES:

Q Would you state your name for the Court and Jury, please, and spell your last name for the Reporter?

A B. V. Corwin, C-o-r-w-i-n.

Q Do you have a nickname, Mr. Corwin?

A Yes, I do, Curly.

Q What is it?

A Curly.

Q Now, would you be sure to speak up loud enough so all the members of the Jury can hear you, the Court and Mr. Salo, the Government's Counsel, sitting here at the first table. Where do you live, Mr. Corwin?

A I live in Enid, 2135 Sundown Circle.

Q What is your principal occupation?

A I am in the oil field service business.

Q How long have you been in that line of work?

A For eighteen years.

[70] Q In March of 1975, were you connected in anyway with the oil lease known as Blansit #2, of L. O. Ward?

A Yes, sir, I was.

Q And, where was that lease?

A That lease is approximately three-quarters of a mile South of what is now on Garrett Road in Enid, and a quarter of a mile East.

* * * *

[77] Q All right, sir. You may return to your seat, sir. Mr. Corwin, during the latter part of March of 1975, did you have occasion to talk with anyone from the Health Department?

A Yes, sir, I did.

Q Do you recall who you talked to?

A I don't recall the name, no.

Q Do you recall when it was?

A Yes, it was March 25.

Q All right. Would you explain to the Court and Jury, please, how it was that you happened to some in contact with this gentleman from the Health Department?

A One of the office personnel from Mr. Ward's office called me on my mobile phone and asked me if I would return a call to this member of the Health Department, that he wanted to talk to me.

Q All right, sir. Did you do that?

A Yes, I did.

Q All right. Now, what did this gentleman tell you, just in substance, not the exact conversation, but what was he calling about?

A He called to tell me that one of Mr. Ward's wells that I was looking after had an oil spill.

Q What action, if any, did you take after that conversation with the official of the Health Department?

[78] A I don't ever recall talking to him again, it's possible I did.

Q No, I mean after you talked to him that day on March 25, 1975, what did you do?

A Well, I immediately proceeded to the location to survey the damage.

Q All right, sir. When you got there, what did you observe?

A I walked the draw, so to speak, from the location back to Boggy Creek and there had, in fact, been some oil run-off of the location and down that draw.

* * * *

[80] Q Now, after you made an examination of the site, what [81] anything, did you do?

A Well, as I recall, I immediately called a bulldozer and a vacuum truck and a crew of roustabouts and proceeded with cleanup operations, to try to clean up as much of it as possible.

Q Okay. Now, what did you do at that time, when you say you cleaned it up?

MR. SALO: Your Honor—

THE WITNESS: Well, I took a bulldozer—

MR. SALO: For the record, I would like to preserve our objection that the cleanup is irrelevant to the civil penalty.

THE COURT: Yes, the objection will be overruled, in view of the Court at this moment, that may not be an issue for the Jury, it might be to the Court with regard to any mitigation, should ultimately the decision be reached for the Defendant. The objection is overruled. You may answer.

Q (By Mr. Jones) Tell me what you did to clean it up.

A Well, the first thing I done was to take the bulldozer and I constructed a dam in the area of the road, close to Boggy Creek, earth and fill, to prevent anything from going—should any reason it decide to rain or anything like that, to prevent it from going on down into the Creek, and we proceeded with our cleanup operations from there backwards from the well with a vacuum truck, trying to pick up all of the [82] visible oil and clean it up in anyway possible.

Q All right. Now, was Mr. Ward present during this cleanup operation?

A I don't recall Mr. Ward being there.

Q Do you know where he was?

A I don't recall right at the minute. He was on another well somewhere, if I remember correctly and I proceeded with the cleanup operations in lieu of him being there immediately.

Q Now, how long did you spend on these cleanup operations, Mr. Corwin?

A As I recall, I spent a portion of the 25th, all day the 26th and a portion of the 27th.

Q Did you personally observe any further cleanup operations?

A Yes, I did. At that time, due to my work schedule, Mr. Ward had some of his company personnel come in and take over the cleanup operations and I merely drove by daily and offered my assistance or whatever.

Q What did you observe that they did, if anything?

A Well, they—they cleaned up every drop of oil up and down that draw from all the way—

Q Now, after you constructed this earth dam, did any other oil go past it?

A Not to my knowledge.

Q At anytime from the time you go out there, through [83] the cleanup period, did you ever see any sheen or discoloration of Boggy Creek caused by any weathered oil from the shale pit?

A No, sir, I didn't.

Q Now, did you see any evidence that, prior to your being there, that any of this substance had entered Boggy Creek?

A No, sir.

Q Did you observe any damage to the immediate environment?

A Do you mean up and down the draw?

Q Well, let's go first to Boggy Creek and then the draw.

A No, I don't believe any of it ever reached—arrived at Boggy Creek.

Q Now, when you were out there several days later, was there still water in the gully?

A Yes.

Q When the cleanup operation was completed, was there any visible sign of the oil?

A No. I thought they done an exceptional job of cleaning it up.

Q Have you, in your eighteen years of experience in the oil field business, seen cleanup operations of other similar spills?

A Yes, sir, I have.

Q And, approximately how many have you seen?

A That's—It would be very numerous—I don't keep [84] track, but probably a hundred.

Q What was your opinion of the cleanup operation or what is your opinion of the cleanup operation out here at this site?

A Well, actually, I think Mr. Ward probably spent more money and time and effort on that one than the average, the ones I've been involved with.

MR. JONES: If I may approach the witness, Your Honor?

THE COURT: Surely.

Q (By Mr. Jones) Mr. Corwin, I will hand you here what previously has been received into evidence as a series of photographs, marked and identified as Defendant's Exhibits 1 thru 6, and ask you, please, if you would look at Defendant's Exhibit 2 and tell the Court and Jury, please, what that is, what does that picture show.

A This is the Blansit #2 location standing South of the well head looking back North down the draw in question on the right-hand side of the map.

Q All right. Now, that is a recent photograph, is it not?

A Yes, that has been since the reserve pit and all the pit areas have been filled.

Q All right. So, now, just show the Court and Jury on this picture, if you can, where this pit was.

[85] A You can see—

THE COURT: Why don't you stand over there in front of them. I'm afraid they can't see much from where you are. Just step over there and point it out to them. Counsel, if you want to look—

THE WITNESS: If you will look in the photo, you can see a different color of dirt running along at the base of where this man is standing and down to this area right here (indicating). The reserve pit is approximately 125 foot square and it would be in this (indicating) area of the top of this hill that you see right there (indicating), the gray, the gray area.

Q (By Mr. Jones) Okay. Where is shale pit?

A It would be right where this (indicating) man is standing, right there (indicating).

Q All right, sir. Now, I hand you, Mr. Corwin—

THE COURT: I'm afraid you might be blocking the view of someone.

Q (By Mr. Jones) I will hand you Defendant's Exhibit No. 5 and ask you, sir, what that is?

A That is a picture standing on the corner of the location, it would be back North and East of the well head and looking down the draw.

Q All right. Now, where is the gully or draw in that picture?

[86] A It's very distinct right down through the middle of the picture. You can see it right down through the middle of the picture.

Q Now, I will hand you, Mr. Corwin, Defendant's Exhibit 3 and ask you, sir, what that picture depicts?

A Okay. This would be the draw area, I would say two to 300 feet, right before you go into Boggy Creek. You can see the road I diagramed right there (indicating), it runs right by that big tree, the City's little access trail to get to the back of their property. You can see it right at the edge of the Creek there (indicating).

Q All right. Now, this was a recent picture, but is this vegetation and what you see there, is that essentially the same as what it was in March of '75, have there been any trees cut down or anything there that you can remember?

A No.

Q All right. Now, I will hand you, Mr. Corwin, Defendant's Exhibit 6, and ask you what that picture depicts?

A This is a portion of the draw, just a short area of the draw that the spill occurred in.

Q And, Defendant's Exhibit 1?

A This looks like the draw immediately where it dumps into Boggy Creek, I would say Boggy Creek would be maybe 25 feet on the other side or between 25 and 50 feet on the other side of this big log. That's looking North down the draw.

[87] Q And, Defendant's Exhibit 4?

A Well, this would be a portion of the same area. This draw goes down into Boggy Creek, this (indicating) is trash from the dump and whatnot, laying in the bottom of that draw, I believe.

Q All right, sir. You may resume your seat, sir. Mr. Corwin, who built the pits out there?

A They were—Mr. Ward contracted Corwin & Hauth, Incorporated, a dirt construction company, which I own part of it.

Q So, your company built the pits?

A Yes.

Q You're sure there was no dike or retaining wall around this shale pit?

A I'm sure there wasn't, yes.

MR. JONES: I have nothing further. Thank you, sir.

THE COURT: All right. You may cross examine.

CROSS EXAMINATION

QUESTIONS BY MR. SALO:

Q Mr. Corwin, those—the photograph that we looked at, those are recent photographs, is that right?

A I believe so, yes.

Q When you were showing the area where the oil spill had been, do these photographs give an accurate picture of what the area looked like at the time you discovered the oil [88] spill?

A Yes, I would say the draw prior to the oil spill looked a good deal like that, yes.

Q I'm referring more specifically to what the ground looked like in the area, does that give an accurate impression of the appearance of the ground after the oil had been spilled?

A Yes, with the exception of the pit areas, it has changed—the pits have been back-filled and leveled off and that photo isn't like it was at that time, but the rest of them I think are, yes.

Q Isn't it true that when you first went out, you observed oil on the ground, it was apparent?

A Yes, sir, I did.

Q That does not appear on the photographs?

A No, it does not.

Q In that sense, they don't give an accurate impression of what that area looked like in terms of the oil?

A Well, I was speaking prior to the day of the oil spill, I think that describes the area.

Q I'm sorry. Then, as of the time of the spill, when you went out to observe it, then, you would say these do not give an accurate impression of the appearance of the area where the spill had occurred?

A Well, there is no oil in the photographs and there was oil on the ground the day I went out and observed it, yes.

[89] Q All right. Now, as to rainfall that occurred prior to the time that you investigated the oil spill, did you say it was your impression that there had been rainfall shortly before or immediately before the discharge?

A Well, during the course of drilling of that well, I distinctly remember having bulldozer equipment called over there to pull trucks in and out, which would have been prior—thirty days prior to the spill, during the course of the drilling and completion operations, we had bulldozers over there to pull trucks in and out, so it had to rain.

Q When would you say that period of time began, when you're speaking about, when you needed to have bulldozers?

A It would have been probably in the first part of March.

Q Can you remember a specific date when these operations began?

A No, I can't.

Q All right.

A I could possibly go back to the records and get invoices and produce that information, if it is necessary, I can do that.

Q Is it possible that the largest rainfall in that period occurred, say a week before this spill?

A Yes, it's possible.

Q Do you have any recollection as to whether there was much rainfall in the several days, say three or four days before the spill?

A. I don't recall it raining three or four days before the spill, no.

MR. SALO: All right. Could I have one second?

THE COURT: Surely, surely.

MR. SALO: I have no further questions.

* * * *

[135] THE COURT: Would you hand the Verdict or Interrogatory rather, that has been answered up? All right. The Interrogatory is properly answered. We'll ask the Clerk to please read it.

THE CLERK: In the United States District Court for the Western District of Oklahoma, L. O. Ward, Plaintiff, versus William G. Coleman, Jr., individually, and as Secretary of Transportation, et al, Defendants, Case No. 76-0303-E and the United States versus L. O. Ward and L. O. Ward Oil & Gas Operations, Defendants, Case No. 76-0456-E, Interrogatory, We, the Jury, duly empaneled and sworn in the above styled cause, do upon our oath find as follows: That oil did flow in a visible quantity from the draw on the L. O. Ward lease into Boggy Creek, signed by Guy W. Chapman, dated May 10, 1977.

THE COURT: All right. Ladies and Gentlemen, you have heard the reading of the answer to the Interrogatory and since under the law it must be unanimous, the answer that is, I will poll the Jurors individually. Does the Juror Clarence Cowan agree to the answer to the Interrogatory?

JUROR COWAN: Yes.

THE COURT: Mary Sipe?

JUROR SIPE: Yes.

THE COURT: Edward Parma?

JUROR PARMA: Yes, sir.

[136] THE COURT: Verla Gleason?

JUROR GLEASON: Yes, sir.

THE COURT: Yes?

JUROR GLEASON: Yes.

THE COURT: Arthur Pliner?

JUROR PLINER: Yes.

THE COURT: And, Mr. Chapman, you're the Foreman?

JUROR CHAPMAN: Yes.

THE COURT: Thank you very much, Ladies and Gentlemen. You're going to be excused in a moment, but I thought I would explain just briefly to you now what reduced the case down to such a simple question, because you Jurors are entitled to know and you're also entitled to know the impact of the decision that you made when you answered the Interrogatory. If you recall, I started out telling the Jury there may be five questions that were involved, first of all, one, was there an oil spill, well, there was no dispute in that, everybody agreed to that, that was not a question to submit to the Jury; number two, that whether or not the spill emanated from the Defendant, and there wasn't any dispute on that, everybody agreed that was right; and third, that said spill flowed into a navigable stream. Now, that was a dispute because I think the Congress meant anything—if it had of gotten as you said it did, into this Boggy Creek, then it goes on from there into the other creek and finally, I believe, Skeleton Creek, and [137] from there to the Cimarron River and then to the Arkansas. And, if that was not the intent of Congress, then, we could spill oil all over practically this whole Country and the Act would not apply, if indeed we had to go direct into a navigable stream, but if it had been headed off at the pass, so to speak, before it ever got to that Creek, I was prepared to hold that this draw is not a navigable stream, by law. Now, four, the question that the spill was of a harmful quantity as defined by the Regulations, now, we learned by the Regulations of what we call a sheen test and that was part of what I defined to you when you asked that question. A sheen test, in common language, means something that is visible by the naked eye and if it can be seen by the naked eye, the Congress has seen fit to say that's a harmful quantity and last, the fifth question, the penalty, as assessed was a reasonable sum and that is for me to determine, and I will determine that in a

few moments. You, Ladies and Gentlemen, may be excused, thank you very much, we appreciate your splendid service during this session of Court. The parties will remain momentarily so we can complete the record, but the Jury may be excused.

(Whereupon, at this point the Jury was excused, after which time the following proceedings were had, to-wit:)

THE COURT: Now, the sole question left is whether or not the civil penalty imposed in connection with this matter [138] was a reasonable sum. Of course, the Court permitted evidence on that point to come in so we could hear the whole thing and that's in the record, and I'm going to reduce the amount of this penalty for the reason that I am convinced that the Defendant did do nearly everything that was possible to alleviate the situation after it was discovered, and because of that, and because of the fact that there was not a great deal of oil that did escape, I'm going to cut the penalty exactly in half, make the penalty $250.00 rather than 500.00. It was suggested to me that I cut the fine or penalty, rather civil penalty, down to a dollar as was done in a case involving General Motors. I don't believe we have an analogous situation here because there the evidence was and the Judge found that General Motors had done everything possible to prevent the pollution as Congress distinguished between trying to clean it up after it occurred. I'm not about to say Mr. Ward is a bad operator or a bad man. I'm convinced he's going to be a good man. We are going to have to be more careful with this wonderful land of ours and do everything humanly possible to prevent these things to start with, otherwise we are all going to be reading Silent Spring, and maybe there will be no Spring at all for our grandchildren. Now, this is a law that I am happy to help enforce and it must be enforced and the teeth that enforce it must indeed be long and sharp ones, so by reducing this fine, Mr. Jones, as you suggest, to a dollar, I believe I would be [139] saying to the industry, here in Oklahoma that actually is not that bad, go ahead and instill this deleterious sub-

stance, kill our fish, kill our streams, pollute the waters, kill the land, because we are so energy conscious that we don't care what you do. I just don't want that message to go forward, at least from here. That's the reason I am not going to impose that minimum, minimal one dollar penalty. It will be $250.00.

Now, I'm going to ask that Counsel for the Government prepare a formal Judgment in accordance with the way we have conducted this Trial, the finding of the Jury with respect to the Interrogatory in Case No. CIV-76-0456-E, that's the one styled United States versus L. O. Ward, that's the civil action to collect the penalty. And, when you have prepared it, I want you to submit it to Counsel for the Defendant for approval as to form, and then have it forwarded on to me for signature and filing and get this done within a week. I would also require that you do the same thing in the other case, but Mr. Jones indicated that he would prefer to prepare that himself, because he may want to appeal. Of course, he may appeal both of them, but the one that found the Statute to be Constitutional, didn't you indicate you would prefer to draw that one yourself?

MR. JONES: Yes, Your Honor, and enter judgment in favor of the Defendant in Ward versus Coleman.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 79-394

UNITED STATES, PETITIONER

v.

L. O. WARD, dba L. O. WARD OIL and GAS OPERATIONS

ORDER ALLOWING CERTIORARI. Filed November 5, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

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Supreme Court, U. S.
FILED
OCT 19 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA,
Petitioner,

VERSUS

L. O. WARD, d/b/a
L. O. WARD OIL AND GAS OPERATIONS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the

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UNITED STATES OF AMERICA,
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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The citations to the opinions in the United States Court of Appeals and the District Court contained in the Petition for Writ of Certiorari are accurate.

JURISDICTION

The statement of jurisdiction contained in the Petition is accurate.

QUESTION PRESENTED

The question presented is accurately and succinctly stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition accurately and adequately sets forth the constitutional and statutory provisions involved.

STATEMENT OF THE CASE

The statement of the controlling facts set forth in the Petition is accurate and fair.

REASONS WHY THE PETITION FOR WRIT SHOULD BE DENIED

The United States urges the Court to grant certiorari because (1) the Court of Appeals judgment "could disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act" (Petition, pg. 12) We disagree for reasons set forth below; (2) the Tenth Circuit's holding that a proceeding to assess a civil penalty in this case is a "criminal case" for purposes of the Fifth Amendment privilege against self-incrimination is inconsistent with prior decisions of this Court because (a) "when Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the Courts have taken Congress at its word" (omitting citations) (Petition, pg. 17), and (b) the civil penalties provided by the Act in question "are remedial, not punitive, under this analysis"; (3) there is an alleged conflict among the Circuits in that other Circuits have held that the proceeding is not "criminal" for purposes of the statutory immunity provision in Section 311(b)(5) which was designed to protect the Fifth Amendment privilege. These cases are distinguishable on their facts.

1. Significantly, the Government's first reason advanced for granting the Petition is not that the decision is in conflict or inconsistent with decisions of this Court or is in conflict with other opinions from different Circuits. The only empirical evidence to support the conclusion that the Court of Appeals decision "could disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act" is a reference to "a sample of 100 civil penalty cases in each of the 12 Coast Guard Districts" which revealed "an idividual owner or operator in almost a fifth of the cases" where spills were reported. The citation for the authority of this study is not given, and we do not know whether the sample is fair or representative or under what circumstances it was made. Indeed, the administrator authority, or publication of the sample is not annotated or referenced. Conceding, however, the validity of the sample, this would mean that of the 14,741 discharges which the Government contends were made in 1978, only approximately 1,400 of these civil penalty cases were against individual owners and operators. Thus, the Court of Appeals decision would affect slightly less than ten pencent (10%) of all civil penalty cases.

It is suggested in the Petition that "the Tenth Circuit's holding could induce increased litigation because of the possibility that civil penalty liability could be avoided altogether if the Government could not establish an independent source of information about the discharge" (Petition, pg. 13, fn. 9). This opinion is not supported by any authority. Indeed, the contrary appears more plausible. It is unlikely that the average individual owner and/or operator would incur the expense of litigation to challenge the

Coast Guard's proposed assessment when the cost of the fine is likely to be substantially less than the cost of litigation. Moreover, there is another consideration which is evident from even this case; any serious spill of "harmful quantities" is likely to be seen and observed by others who will report it even if the owner or operator does not. In fact, that is exactly what happened here. Two days after the spill, "a sanitarian with the Oklahoma Department of Health on a routine inspection of a land fill near Ward's property observed that oil had seeped from the retention pit, down a gulley, and into Boggie Creek (citations of the record omitted), a tributary of the Arkansas River System" (Petition, pg. 7). The record does not disclose whether the sanitarian or the Oklahoma Department of Health reported the spill to the Coast Guard or the EPA. If either had done so, then the first notification to the Coast Guard or EPA would have come from an individual other than the owner or operator, and in those circumstances, under the ruling of the Court of Appeals, the Government could have proved its case of the spill and imposed its fine independently of the first notification by the owner/operator. Moreover, there may be compelling reasons why an owner-operator would resist the self-reporting feature: he may have intentionally or inadvertently delayed the report. Indeed, the Petition suggests that is exactly what happened here. In those rare or remote instances (probably attributable in the beginning to ignorance of the law or of the law's mandate), the number of independent operators who would challenge the imposition of the fine drastically reduces itself.

Even assuming the Petition's summary of the sample is correct, somewhere between 75% to 90% of the spills

would not be affected by the Court's decision because they involve spills by corporations which do not have the Fifth Amendment privilege against self-incrimination. Therefore, the Court of Appeals decision does not "disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act." We do, of course, recognize that it may present problems of administration for the remaining small percentage of individual owners or operators who will assert their Fifth Amendment privilege against self-incrimination, and to that extent it will prove difficult to enforce the law. However, those individuals are likely to be owners or operators who have sustained only small spills for the reasons set forth above.

It has long been recognized that the Fifth Amendment privilege may inhibit certain legitimate functions but "the immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *United States* v. *White,* 322 U.S. 694, at 698.

2. The second argument advanced for granting the writ is that the decision is inconsistent with prior decisions of this Court because this Court "has viewed the question whether a given proceeding is criminal for purposes of constitutional protection as one of statutory interpretation (omitting citations)" (Petition, pg. 17), and "when Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the Courts have taken Congress at its word. *United States* v. *J. B. Williams Company,* 498 F.2d 414, at 421 (2d Cir. 1974)" (Petition, pg. 17). The Government suggests that this certainly should be the case "if the measure of

recovery is not so excessive so as to transform what was intended to be a civil penalty into a criminal penalty" (Petition, pg. 17). With respect to the last statement, we need only note that the Coast Guard can assess a fine up to $5,000.00 for each offense at the time in question under the provisions of Section 311(b)(6), and as the Petition itself notes in footnote 2, this has been amended to provide for a civil penalty up to $50,000.00 and under some circumstances as high as $250,000.00, all denominated "civil" penalties. In view of that statutory language, we are puzzled at the Petition's suggestion that the statutory "measure of recovery is not so excessive as to transform what was intended to be a civil penalty into a criminal penalty" (Petition, pg. 17). One need only observe that there are few substantive criminal offenses that carry penalties for a single offense as high as $50,000.00 let alone $250,000.00.

With respect to the argument that the congressional characterization of the penalty as civil should be controlling, the Court of Appeals gave due weight to this argument, but it realized that the use of the label "civil penalty" does not automatically determine that Ward is to be denied his constitutional guarantees. The Court reasoned that the Government could not be allowed to circumvent constitutionally guaranteed rights afforded to citizens and impose penalties upon them, simply by labeling a penalty "civil" and providing for administrative collection or enforcement. The description of the penalty is entitled to be given weight, but it is not controlling. *Trop* v. *Dulles*, 356 U.S. 86 at 94-95 (1958); *United States* v. *LaFranca*, 282 U.S. 568 (1931); *United States* v. *Constantine*, 296 U.S. 287 (1935). This is so even if the only penalty sought to be

extracted is a monetary one. *United States* v. *Constantine*, supra. Indeed, as we demonstrate below, the fact that it is a monetary penalty to be extracted is not the sole determinative factor.

The Court of Appeals treated the problem before it as one of statutory construction applying the rule of *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). It is obvious from a reading of the Court of Appeals' opinion that its entire emphasis and orientation was towards resolution of statutory interpretation and construction, applying the criteria laid down in *Kennedy* v. *Mendoza-Martinez*, supra, and in this connection appeared to place great weight on the fact that the sanction involved here appears excessive "in relation to the alternative purposes assigned" (Petition, pg. 16a). The Court of Appeals held, "However, we believe that the factors employed in determining the amount of the penalty indicate a punitive nature. Imposition of penalties even in situations where the discharge is accidental, non-negligent and non-intentional could be excessive. This is especially so, when the operator, in good faith, attempts to clean up, and in fact does clean up the discharge on his own initiative. Inasmuch as the amount of the penalty is correlated to the size of the business involved, a large business concern may well be heavily penalized despite the lack of fault . . . Commandant Instruction 5922.11(a), supra. In such a situation, the imposition of a large penalty would be excessive. Thus, we conclude that this indicator leans in favor of the penal nature of the Act" (Petition, pg. 17a).

It is clear that the Court of Appeals undertook an analysis based upon an interpretation and construction of the statutes:

> "In undertaking our assessment of the statutory provisions here in question, we must analyze (i) the congressional intent discernable from the face of the statute, (ii) the enforcement mechanism of the statute, and (iii) the indicators of congressional intent enumerated by the Supreme Court in *Kennedy* v. *Martinez*, supra." (Petition, pg. 7a)

3. The third asserted reason for granting the Petition is that the court's decision "is also inconsistent with the conclusions reached by a number of courts that such a proceeding is not 'criminal' for purposes of the statutory immunity provisions in Section 311(b)(5) which was designed to protect the Fifth Amendment privilege." In making this assertion, the Petitioner relies upon *United States* v. *Allied Towing Corporation*, 578 F.2d 978 (4th Cir. 1978); *United States* v. *LeBouf Brothers Towing Company*, 537 F.2d 149 (5th Cir. 1976), *cert. den.* 430 U.S. 987 (1977); *Apex Oil Company* v. *United States*, 530 F.2d 1293 note 7 (8th Cir. 1976), *cert. den.* 429 U.S. 827 (1977); *United States* v. *Atlantic Richfield Company*, 429 F.Supp. 830 (E.D. Pa. 1977), aff'd *sub. nom.*, *United States* v. *Gulf Oil Company*, 573 F.2d 1303 (3rd Cir. 1978). It is stretching the point, however, to say that the opinion below is "inconsistent" with those cases.

First, Petitioner recognizes that the cases upon which it relied involved corporate defendants and that "there were expressions in several of the opinions that a closer scrutiny may be warranted in the case of an individual defendant (citations omitted)."

Secondly, the alleged inconsistency is more superficial than real because in each of the cases relied upon to establish the insufficiency, the owner-operator was a corporation which could not invoke the Fifth Amendment privilege against self-incrimination, but was arguing that because it had reported the spill, it was therefore entitled to take advantage of that portion of the statute that provides a form of statutory immunity prohibiting information contained in the notification of the spill from being "used against any such person in any criminal case . . ." Section 311(b)(5).

In each of the cases relied upon in the Petition to establish the alleged inconsistency among the Circuits, the corporations had claimed that the civil penalty provisions of the Act were in reality criminal cases within the meaning of Section 311(b)(5) and therefore the notification granted them a form of use immunity, *LeBouf Brothers*, supra, at 151. In those cases, and *LeBouf Brothers* is typical, the analysis of the Court of Appeals did not turn upon statutory construction of the "civil penalties" but rather upon the fact that "defendants cannot claim a pertinent constitutional protection, the issue is purely one of statutory construction, and Appellees are foreclosed by the clear statutory wording." *LeBouf Brothers*, pg. 152. The Court in *LeBouf Brothers* also recognized, "the normal rule that statutory grants of immunity should be interpreted strictly (citations omitted) *LeBouf Brothers*, supra, 152 fn. 11.

This alleged inconsistency can be reconciled quite easily. Section 311(b)(6) is a "criminal statute" for purposes of the Fifth Amendment, but not for purposes of granting use immunity to a corporation in a criminal prose-

cution. It is well recognized by decisions of this Court that a statute may be criminal or quasi-criminal for purposes of the protection of the Fifth Amendment self-incrimination clause even though it may not be criminal in relation to other portions of the Bill of Rights. This is the teaching of *Boyd* v. *United States,* 116 U.S. 616 (1886); reaffirmed in *United States* v. *United States Coin & Currency,* 401 U.S. 715 (1971). The actual and historical application of the "quasi-criminal" doctrine of *Boyd* shows that it refers not to the kind of penalty involved but to the nature or kind of particular constitutional right involved. For example, the quasi-criminal doctrine has been held to invoke the Fifth Amendment self-incrimination clause against enforcement of a civil money penalty, *Lees* v. *United States,* 150 U.S. 476 (1893), but not to invoke the Fifth Amendment double-jeopardy clause. *Helvering* v. *Mitchell,* 303 U.S. 391 (1938). With this distinction clearly in mind, the alleged inconsistency evaporates.

The court below analyzed the statute and the enforcement scheme carefully, dispassionately and critically. The court gave due weight to the fact that the penalty was denominated civil (Petition, pg. 8a), but found that the statute "on its face, tends to evidence a punitive intent" because of the "language dealing with the automatic assessment and determination of the amount of the penalty" (Petition, pg. 9a). However, the court said that this determination was not conclusive for purposes of treating it criminal in nature. It then turned to a consideration of the administrative enforcement scheme and the *Kennedy* v. *Mendoza-Martinez* indicators of congressional intent. With respect to the enforcement procedures, it found that the en-

forcement mechanism applied by the Coast Guard "clearly indicates that the assessment and determination of the amount of the penalty is based upon punitive considerations" (Petition, pg. 12a). Indeed, it would be difficult to hold otherwise in view of the plain language of the Coast Guard regulations which are cited in the body of the court's opinion (Petition, pg. 11a).

In determining congressional intent, the court isolated seven factors; (1) whether the sanction involves an affirmative disability or restraint; (2) whether historically it has been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote traditional aims of punishment — retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purposes assigned. *Kennedy,* supra, 168-169.

The Court held as follows:

1. Concerning the first indication, the court found, "It offers little indication as to Congress' intent in this instance."

2. The court held, "This indicator also gives little indication as to Congress' intent. Monetary penalties have traditionally been applied to both criminal and civil statutes" (Petition, pg. 14a).

3. With respect to scienter, the court found that the statute on its face does not contain an element of scienter, but that the factors enumerated in the statute and Com-

mandant's Instructions used in determining the amount of the penalty indicate a scienter requirement, and this factor alone with the absence of a scienter requirement in the criminal statute dealing with the imposition of criminal penalties of oil or hazardous substance indicated to the court a finding that the statute was criminal in nature (Petition, pg. 14a-15a).

4. With respect to the fourth indicator, the court said directly, "In our view, this factor lends considerable weight to a finding that the civil penalty is actually criminal in nature" (Petition, pg. 15a). This is so the court said because the statutes and administrative policies, "have the effect of retribution. The penalties are based on such factors as the gravity of the violation, the degree of culpability and the prior record of the party. The fact that a party acted in good faith, could not have avoided the discharge and, once it occurred, undertook clean-up measures immediately is to be given no consideration in relation to the 'imposition or amount of a civil penalty.'" (Petition, pg. 15a).

5. With respect to the fifth indicator, here again the court found that this was indication that the penalty was in fact criminal in nature because there is a statute criminal in nature for the identical offense (Petition, pg. 15a).

6. The court declined to employ the Government's rationale on the sixth indicator because although the penalty could be regarded as compensation, the court felt this would be true only if the factors in determining the amount thereof reasonably related to the extent of damage to the environment rather than the other considerations which indicate retribution (Petition, pg. 16a).

7. The court found that the factors employed in determining the amount of the penalty indicates a punitive intent in nature (Petition, pg. 17a).

Even if the court was wrong in its application of the *Kennedy-Mendoza-Martinez* case, the court's decision could be sustained under the holdings of *Boyd* v. *United States*, supra, *United States* v. *United States Coin & Currency*, supra, and *Helvering* v. *Mitchell*, 303 U.S. 391.

CONCLUSION

The court below fully considered and correctly decided the issues. This Court's prior decisions are controlling and in line with the Circuit Court. *Boyd*, supra, *Helvering*, supra, the allegedly conflicting decisions are distinguishable on their facts and further distinguishable by the rule of *Boyd*, supra. There is little evidence upon which to base a conclusion that the court's holding would significantly disrupt the intent of the Act.

The Petition for Writ of Certiorari should be denied, or if granted, judgment of the United States Court of Appeals for the Tenth Circuit should be sustained summarily.

Respectfully submitted,

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October, 1979

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the above and foregoing Brief in Opposition was mailed this ..... day of October, 1979, to Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the United States Post Office, postage prepaid.

Stephen Jones

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 598 F.2d 1187. The opinion of the district court (Pet. App. 22a-35a) is reported at 423 F. Supp. 1352.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on May 10, 1979. On August

2, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 7, 1979. The petition was filed on September 7, 1979, and granted on November 5, 1979 (A. 16, 62). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a proceeding under the Federal Water Pollution Control Act for the assessment of a "civil penalty" against the individual owner or operator of a facility from which oil was discharged in violation of the Act, is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment to the Constitution in which the government is barred from using any information about the discharge that the individual is required by the Act to report under pain of criminal sanctions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 311(b) of the Federal Water Pollution Control Act,[1] 33 U.S.C. (Supp. IV 1974) 1321(b), as in effect when this case arose,[2] provided in pertinent part:

* * * * *

> (3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President * * * is prohibited, * * *.
>
> * * * * *
>
> (5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or

---

[1] Since enactment of the Clean Water Act of 1977, the amended Federal Water Pollution Act has commonly been referred to as "the Clean Water Act." However, because this case only directly concerns the pre-1977 version of the statute, we will refer to it as "the Federal Water Pollution Control Act," "the Act," or "the FWPCA."

[2] Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468 (see notes 10, 13, 15, 16 and 18, *infra*), but these amendments have no direct bearing on the present case.

facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. * * *

* * * * *

Section 311, as in effect when this case arose, is reproduced in its entirety in Appendix D to the petition for a writ of certiorari (Pet. App. 36a-57a).

STATEMENT

1. On or about March 23, 1975, oil escaped from an oil retention pit at a drilling facility on premises leased by respondent L. O. Ward, d/b/a L. O. Ward Oil and Gas Operations, near the City of Enid, Oklahoma (Pet. App. 2a, 23a; Tr. 47-48; A. 19, 29, 44-45). On March 25, a sanitarian with the Oklahoma State Department of Health, conducting a routine inspection of a landfill near respondent's property, observed that oil had seeped from the retention pit, down a gully, and into Boggie Creek (Tr. 47-51; A. 44-47), a tributary of the Arkansas River system (Pet. App. 2a). On the same day, one of respondent's employees received a telephone call from the Oklahoma State Department of Health, notifying him of the discharge (Tr. 77; A. 51).

As required by Section 311(b)(5) of the FWPCA,[3]

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[3] Section 311(b)(5) provides that the person in charge of a facility shall immediately notify the "appropriate agency" of the federal government as soon as he has knowledge of a discharge of oil or a hazardous substance from the facility in violation of Section 311(b)(3) of the Act. The latter section prohibits the discharge of oil or hazardous substances into navigable waters or adjoining shorelines in quantities determined in regulations issued by the President to be "harmful." Because the oil discharged in the present case was visible on the surface of Boggie Creek (Tr. 50; A. 46-47), it was in a "harmful" quantity under the applicable regulations, 40 C.F.R. 110.3 (1974), issued by the Administrator of EPA pursuant to authority delegated by the President in

respondent notified the regional office of the Environmental Protection Agency (EPA) by telephone on April 2 that a discharge of oil had taken place.[4] Respondent submitted a more complete written report of the discharge to EPA on June 25 (Plaintiff's Exh. 1; A. 21-23, 31), as required by Section 308(a)(A) of the FWPCA, 33 U.S.C. 1318(a)(A).[5]

Section 1 of Exec. Order No. 11735, 3 C.F.R. 793 (1971-1975 Compilation).

In Section 7 of the same Executive Order, the President designated the Coast Guard as the "appropriate agency" for purposes of receiving the notice of a discharge required by Section 311(b)(5). Current Coast Guard regulations provide that such notification may be given, *inter alia*, to the government official predesignated as the On-Scene Coordinator for the geographic region in which the discharge occurs. 33 C.F.R. 153.203(a)(2). The Administrator of EPA is responsible for furnishing the On-Scene Coordinator for inland waters, 33 C.F.R. 153.103(p), and EPA is therefore an appropriate agency to receive notification under Section 311(b)(5). Notice to EPA apparently was also appropriate at the time of the discharge in this case. 33 C.F.R. 153.203(a); 33 C.F.R. 153.105 (1975). Cf. *United States* v. *Kennecott Copper Corp.*, 523 F.2d 821, 824 (9th Cir. 1975).

[4] A memorandum of the conversation prepared by the EPA employee who received the telephone call was included as part of the administrative record but not introduced at the trial de novo in the district court. Because this memorandum is relevant to the constitutional issue presented, it was included as an appendix to the government's brief in the court of appeals and is reproduced in the Appendix in this Court (A. 17-18).

[5] Section 308(a)(A) of the FWPCA authorizes the Administrator of EPA to require the owner or operator of any point source of effluents to make such reports, maintain such records, and provide such other information as the Administrator may require in order to enable the Administrator to develop effluent or other limitations, to determine whether a person has violated existing limitations or standards, or to carry out other provisions of the FWPCA. There are civil and criminal penalties for the failure to comply with these requirements. 33 U.S.C. 1319(c) and (d).

By letter apparently sent in late May of 1975, EPA requested respondent to submit a written report of the discharge and advised him that failure to do so could result in imposition of civil or criminal sanctions. (This letter was not included in the record in the district court, but because it is part of the administrative record and relates to the constitutional issue presented, it is reproduced in the Appendix (A. 19-20)). Because respondent was therefore compelled to submit this report to EPA under Section 308, use of that report in the collection of a civil fine from respondent raises the same constitutional question as does the use of information furnished by respondent on April 2 to the "appropriate agency" (again, in this instance, EPA; see note 3, *supra*) as required by Section 311(b)(5) of the Act.

By letter dated August 15, 1975 (A. 24-25), EPA forwarded respondent's June 25 report of the discharge to the Coast Guard (Pet. App. 3a), which is responsible for assessing civil penalties under Section 311(b)(6) of the Act against those responsible for the discharge of "harmful" quantities of oil or hazardous substances into or upon navigable waters or adjoining shorelines. On December 19, 1975, following notice and opportunity to be heard, the Coast Guard assessed a civil penalty against respondent in the amount of $500 (Pet. App. 3a). There is no indication in the record that this assessment was based on information other than that forwarded to the Coast Guard by EPA, which had in turn received the information from respondent pursuant to Sections 311(b)(5) and 308(a)(A) of the Act. Re-

spondent filed an administrative appeal from this ruling, contending that the reporting and enforcement scheme violated his Fifth Amendment privilege against compulsory self-incrimination, but this administrative appeal was denied (Pet. App. 3a, 23a; A. 26-28).

2. On April 13, 1976, respondent filed suit in the United States District Court for the Western District of Oklahoma against the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA to enjoin enforcement of Sections 311(b)(5) and (6) and collection of the administratively assessed penalty (Pet. App. 3a). Respondent moved to convene a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282.[6] On June 4, 1976, the United States filed a separate action in the district court to collect the unpaid penalty (Pet. App. 3a). The court denied respondent's motion to convene a three-judge court on the ground that no substantial challenge to the constitutionality of the statute was presented (Pet. App. 23a n.2) and ordered the two cases consolidated (*id.* at 24a).

The court denied respondent's motion for summary judgment, in which he again argued that the civil penalty described in Section 311(b)(6) is criminal or "quasi-criminal" in nature and that use of information furnished under the self-reporting scheme therefore violated his Fifth Amendment privilege

[6] Section 2282 of Title 28, United States Code, was repealed by Section 2 of Pub. L. No. 94-381, 90 Stat. 1119 (August 12, 1976), but, under Section 7 of that Act, 90 Stat. 1120, it remained in effect with respect to cases previously filed.

against compulsory self-incrimination (Pet. App. 24a-31a, 35a).

The court reasoned that whether a given sanction is civil or criminal is a question of statutory construction (Pet. App. 24a, citing *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972)). The court found (Pet. App. 26a) that Section 311(b)(6) is "unambiguous" in this regard and that "congressional intent to impose a civil penalty can be discerned from its face." The court concluded (*ibid.*) that the penalty is expressly labelled "civil," provision for administrative assessment of the penalty is indicative of congressional intent to impose a civil sanction, and the civil nature of the penalty is underscored by its juxtaposition with a provision for *criminal* penalties in the immediately preceding Section 311(b)(5) for those who fail to report a discharge immediately to the appropriate agency of the federal government. The court also found (Pet. App. 27a-31a) the civil nature of the penalty to be supported by reference to the factors set forth in this Court's decision in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), quoted at pages 34-35, *infra*.

The case was then tried to a jury,[7] which found that oil from respondent's facility did spill into Boggie Creek (Tr. 135; A. 58). The court reduced the penalty to $250 in view of the amount of oil that escaped and its conclusion that respondent had been

[7] A jury trial was not required by the Seventh Amendment. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977).

diligent in his clean-up efforts after the discharge was discovered (Tr. 138-139; A. 60-61).

3. The court of appeals reversed (Pet. App. 1a-19a), holding that the civil penalty proceeding in Section 311(b)(6) is criminal in nature, at least for purposes of the Self-Incrimination Clause of the Fifth Amendment, and that notification given to the appropriate agency as required by Section 311(b)(5) could not be used in determining either liability for or the amount of the civil penalty assessed under Section 311(b)(6).

The court acknowledged the "remedial" purpose of the provision (Pet. App. 9a), reflected in the statutory direction to pay the civil penalties assessed under Section 311(b)(6) into a revolving fund to defray the costs of administration and enforcement of Section 311 and of cleaning up oil spills where those costs are not otherwise recoverable (see Section 311(k), 33 U.S.C. 1321(k); Pet. App. 53a). But, in concluding that the civil penalty provision is nevertheless penal or criminal for purposes of the Self-Incrimination Clause, the court relied (Pet. App. 9a-12a) upon the requirement that a civil penalty be assessed in every case without regard either to fault for the discharge or the subsequent mitigation of damage through clean-up efforts; this automatic assessment, the court concluded, is indicative of a punitive or retributive purpose. The court found (Pet. App. 11a-12a, 14a, 17a) the punitive or retributive purpose of the penalty to be reenforced by implementing instructions issued

by the Commandant of the Coast Guard (A. 38-40).[8] These instructions stated that the Coast Guard would assess some penalty in every case, that a penalty at or near the maximum of $5000 would be assessed unless one of the factors listed in Section 311(b)(6) justified a lesser penalty, that the degree of culpability and prior record of the person responsible for the discharge would be taken into account, and that the penalty would not be based on the responsible party's clean-up effort or expense. The court also attached importance to the fact that the conduct involved—a discharge into navigable waters—may already be a crime under Sections 13 and 16 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 and 411 (Pet. App. 13a, 15a-16a, citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), and what it viewed as the possibly excessive amount of the penalty in relation to the remedial purposes ascribed

[8] Commandant Instruction 5922.11A (Feb. 23, 1973) relied upon by the court of appeals, was reprinted in an appendix to the opinion in *United States* v. *LeBeouf Bros. Towing Co.*, 377 F. Supp. 558, 568-570 (E.D. La. 1974), rev'd, 537 F.2d 149 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977). Neither petitioner nor respondent cited or relied upon this Instruction in the briefs in the court of appeals, and that Instruction had been superseded by Instruction 5922.11B (Oct. 10, 1974) by the time of the occurrences and decisions in this case. Instruction 5922.11A is reprinted in the Appendix (A. 38-40), and pertinent portions of Instruction 5922.11B are reprinted as an Appendix to this brief (App., *infra*, 1a-7a). The Coast Guard is in the final stages of preparing a revision of the Instruction, which will then be incorporated as a new chapter in the Coast Guard Merchant Marine Safety Manual. The revision, undertaken in part to reflect the 1977 and 1978 amendments to Section 311, is not expected to depart materially from the existing Instruction 5922.11B in areas relevant to this case.

to it where the penalty is assessed without regard to fault (*id.* at 16a-17a).

The court did not strike down either the self-reporting requirement in Section 311(b)(5) or the civil penalty provision in Section 311(b)(6); instead, it fashioned a use and derivative use immunity and remanded the United States' collection suit to the district court for further proceedings consistent with its opinion.[9]

SUMMARY OF ARGUMENT

The Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1251 *et seq.*, sets forth a comprehensive statutory framework "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). In furtherance of this goal, Section 311 of the Act, 33 U.S.C. 1321, regulates the discharge of oil and hazardous substances into the Nation's waters.

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[9] The court of appeals also concluded (Pet. App. 4a-6a) that the district court had properly declined to convene a three-judge court pursuant to 28 U.S.C. (1970 ed.) 2282 in the action brought by petitioner. The court of appeals noted that a judgment for respondent in the district court would not have restrained enforcement or operation of the FWPCA because the self-reporting system would have remained intact, and civil penalties could still have been assessed if the government proved its case on the basis of information other than that derived from the notification required by Section 311(b)(5). See also *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). The court therefore remanded respondent's injunctive action to the district court with instructions to dismiss (Pet. App. 19a, 21a). Neither petitioner nor respondent has sought review of the court of appeals' remand of that action, and there is, as a result, no issue before the Court regarding the convening of a three-judge court.

Section 311(b)(3) prohibits the discharge of "harmful" quantities of oil and hazardous substances into the waters. Section 311(b)(5) requires the person in charge of any facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) to immediately notify the federal government so that prompt clean-up and mitigation measures may be taken. Section 311(b)(5) expressly provides, however, that this notification and information derived from it may not be used against the reporting person "in any criminal case." Section 311(b)(6) provides that a "civil penalty" shall be assessed against the owner or operator of the vessel or facility where the discharge occurred, the amount of the penalty to be determined according to the gravity of the violation, the size of the business operation, and the effect of the penalty on the ability of the owner or operator to remain in business.

The privilege against compulsory self-incrimination applies only in a "criminal case." The court of appeals held that the "civil penalty" prescribed in Section 311(b)(6) is criminal in nature and that information about a discharge the person in charge of a facility or vessel is required by Section 311(b)(5) to furnish the federal government cannot, under the Fifth Amendment privilege, be used in the proceeding to assess and collect the penalty. This conclusion was plainly in error.

A. The question whether a given penalty is criminal or civil is one of legislative intent. Here, Congress could not have been clearer in expressing in the very language of the Act its intent that the penalty is civil, not criminal in nature. It is denomi-

nated a "civil penalty," and the administrative procedure for its assessment demonstrates that it was not intended to be criminal. Moreover, in the immediately preceding Section 311(b)(5), Congress provided what are plainly criminal sanctions for the failure to notify the federal government of a discharge, thereby demonstrating that it knew how to provide for criminal sanctions when it so desired. Congress was sensitive to the Fifth Amendment implications of the self-reporting scheme, and expressly provided in Section 311(b)(5) that the compelled notification could not be used against the reporting individual "in any criminal case." The quoted language is drawn directly from the Fifth Amendment. Thus, when Congres used the term "civil penalty" in Section 311(b)(6), it must be presumed that it did so advisedly, with full knowledge of the traditional distinction between criminal and civil sanctions, and its judgment that the civil penalty proceeding was not a "criminal case" to which the statutory —and therefore the constitutional—immunity attaches is entitled to great weight.

B. There is, moreover, no indication that this plain language of the Act masks a contrary congressional intent to impose what amounts to a criminal sanction. The penalty is remedial, not punitive, under this Court's cases.

The penalties are paid into a special contingency fund established in the Treasury under Section 311(k), from which the government's costs of cleaning up discharges of oil and hazardous substances are paid. Although the government's clean-up costs may

in many cases be recovered from the owner or operator of the facility or vessel where the discharge occurred (see Section 311(f)(1)), the civil penalties assessed in *all* cases serve to underwrite the government's costs of removing those discharges for which the costs cannot be recovered—because the owner or operator has a statutory defense to liability for clean-up costs, is insolvent, or cannot be identified. Thus, the civil penalty section imposes a type of absolute, enterprise liability for these costs on those who engage in the activity of handling oil and hazardous substances and, as a result, create the risk of causing the discharges into the Nation's waters that Section 311 was intended to prevent.

The civil penalty provision was also intended to deter discharges of oil and hazardous substances by causing those who handle them to take the economic consequences of the penalty into account and to heighten the degree of care they exercise. Finally, the civil penalty may be viewed as compensation to the United States, acting *parens patriae*, for the ecological harm that may be presumed to follow a discharge of oil or a hazardous substance, even where that discharge is cleaned up promptly.

C. The penalty is also plainly not criminal in nature under the analysis suggested in this Court's opinion in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). A monetary penalty imposes no affirmative disability or restraint on personal liberty, such as the exile involved in *Mendoza-Martinez* itself or disqualification from the practice of a profession involved in the cases cited in that opinion.

Monetary penalties have long been accepted as a legitimate civil remedy, and, accordingly, have not, unlike banishment or professional disqualification, been historically regarded as punishment.

A penalty is imposed under Section 311(b)(6) for all discharges, without regard to fault, and therefore does not come into play only upon a finding of *scienter*—another factor identified in *Kennedy* v. *Mendoza-Martinez, supra*. The penalty is not retributive in its purpose; and while it has the broad, prospective deterrent function of encouraging a higher standard of care by interjecting an additional economic consideration into the handling of oil and hazardous substances, the penalty does not deter in the manner of a criminal sanction by an *in terrorem* effect or by a monetary sanction that is wholly disproportionate to the harm that may be caused.

Although discharges of oil and hazardous substances may in some cases be a crime under the Rivers and Harbors Act of 1899, 33 U.S.C. 407 and 411, the civil penalty in Section 311(b)(6) was not designed as *additional punishment* for violation of those provisions; it imposes a penalty for violation of a different provision, Section 311(b)(3) of the FWPCA, which contains no criminal sanctions. Finally, the civil penalty has remedial purposes not tied to any intent to punish, so that the penalty in this case ($250) and generally (up to a maximum of $5000) cannot be regarded as excessive in relation to those remedial purposes.

D. Nor can the penalty be regarded as "quasi-criminal," implicating the Fifth Amendment privi-

lege against compulsory self-incrimination, even if it is not criminal for purposes of all constitutional protections normally attaching in a criminal proceeding. The Court has made clear that a nominally civil proceeding for the forfeiture of goods or recovery of a monetary penalty can be regarded as criminal only where a finding of liability depends on the commission of an underlying criminal offense. The Fifth Amendment privilege therefore does not apply where the civil penalty is remedial in nature, and is not intended to result in the equivalent of criminal punishment. *Helvering* v. *Mitchell*, 303 U.S. 391, 404 n. 12 (1938).

ARGUMENT

I.

SECTION 311 IS DESIGNED TO PREVENT AND PROVIDE FOR THE CLEAN-UP OF DISCHARGES OF OIL IN FURTHERANCE OF THE ACT'S BROAD REMEDIAL PURPOSE TO MAINTAIN THE INTEGRITY OF THE NATION'S WATERS

The Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1251 *et seq.*, sets forth a comprehensive statutory framework designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As a part of this overall plan, Section 311 of the Act, 33 U.S.C. 1321,[10] regulates the discharge of oil and

[10] The substance of Section 311 was first added as Sections 11 and 12 of the Act, 33 U.S.C. (1970 ed.) 1161 and 1162, in 1970. Federal Water Pollution Control Act Amendments of 1970, Pub. L. No. 91-224, Section 102, 84 Stat. 91, 98. These sections were added to replace the Oil Pollution Act of 1924,

hazardous substances into navigable waters in fulfillment of the congressional policy that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States * * *." Section 311(b)(1).

Congress employed a number of different measures to accomplish this "no discharge" objective. Section 311(b)(3), as in effect when this case arose, prohibited the discharge into the navigable waters of the United States [11] or upon adjoining shorelines [12]

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33 U.S.C. (1964 ed.) 431 *et seq.*, which had proven to be ineffective because it applied only to discharges that were grossly negligent or willful, because it applied only to vessels and therefore did not cover discharges from stationary sources, and because it did not extend beyond oil to other hazardous substances. The addition of these new sections in 1970 was spurred by the breakup of the tanker *Torrey Canyon*, "with its incalculable damage to the coast of England and its nearly $8 million cleanup cost," and by the Santa Barbara Channel oil spill, which caused "vast" and "appalling" damage to marine life and recreation in the area. See H.R. Rep. No. 91-127, 91st Cong., 1st Sess. 2 (1969); see also S. Rep. No. 91-351, 91st Cong., 1st Sess. 3, 6 (1969). The provisions were combined in Section 311 of the Act (33 U.S.C. 1321) in the comprehensive Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 862 *et seq.*, and with modifications not directly relevant to this case, have been carried forward to the present time.

[11] Boggie Creek is part of the navigable waters of the United States for purposes of Section 311, which is not limited in coverage by technical notions of navigability. See Pet. App. 2a n.1; *United States* v. *Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974); 33 C.F.R. 2.05-25(b); 33 U.S.C. 1362(7); cf. *Kaiser Aetna* v. *United States*, No. 78-738 (Dec. 4, 1979), slip op. 9-10.

[12] Section 311(b)(3) also prohibits the discharge of oil and hazardous substances into the "contiguous zone" of waters adjacent to territory of the United States, as established

of oil or hazardous substances in quantities determined by the President under Section 311(b)(4) to be "harmful to the public health or welfare of the United States." The President delegated the function of determining what constitutes "harmful" quantities under this provision to the Administrator of EPA. Exec. Order No. 11735, Section 1, 3 C.F.R. 793 (1971-1975 Compilation). Under EPA regulations in effect now and in 1974, discharges of oil are defined as "harmful" if they violate applicable water quality standards or cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited in or upon either. 40 C.F.R. 110.3. Because the discharge in this case caused a sheen on the surface of Boggie Creek (Tr. 50; A. 46-47), it was of a harmful quantity under the regulation.[13]

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or to be established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639, 40 C.F.R. 110.1(g).

[13] In his motion for summary judgment, respondent challenged the validity of the "sheen test" of harmfulness, but this challenge was rejected by the district court (Pet. App. 32a-35a), and respondent did not pursue this issue in the court of appeals. Sections 311(b)(3) and (4) were amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as *may* be harmful" (emphasis added), as determined by the President. This change was intended to make clear that the Act "does not require an assessment of actual harm in the variety of circumstances in which such substances might be discharged." 124 Cong. Rec. S18995, H13599 (daily ed. Oct. 14, 1978).

Section 311(c)(1) authorizes the President to remove or to arrange for the removal of any oil or hazardous substance discharged into or upon the navigable waters of the United States or adjoining shorelines, unless he determines that the owner or operator of the vessel or facility from which the substance was discharged will properly do so. The government's clean-up costs are paid out of a special revolving fund established in the Treasury by Section 311(k).

The owner or operator of the vessel or facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) is liable to the United States for the actual costs incurred by the government in clean-up operations except where the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party. Section 311(f). Funds recovered pursuant to this provision are deposited in the revolving fund established under Section 311(k). Although Congress has from time to time appropriated money for the fund, it is in general intended to be replenished by recoveries from those responsible for prohibited discharges.

Section 311(b)(5) of the FWPCA requires "[a]ny person in charge" of a vessel or facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) to "immediately notify the appropriate agency of the United States Government of such discharge." This notification enables the federal government to ensure that clean-up and other remedial measures are taken promptly in order to minimize the ensuing damage. See S. Rep. No. 91-351, *supra*, at 16. Failure to notify the appropriate agency immediately is a criminal offense punishable by a fine of up to $10,000 and imprisonment for one year. In recognition of the Fifth Amendment privilege, however, Section 311(b)(5) provides that the "[n]otification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement." [14]

Section 311(b)(6), as it read at the time of the discharge involved in this case, provided that the "owner or operator" of a facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating in an amount not to exceed $5,000

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[14] Respondent notified EPA eight days after one of his employees was informed of the discharge (A. 17-18). This notification would not appear to have been "immediate," as Section 311(b)(5) requires. See *United States* v. *Kennecott Copper Corp.*, 523 F.2d 821 (9th Cir. 1975); *United States* v. *Ashland Oil and Transportation Co., supra.* The government argued in the court of appeals that because respondent did not notify the appropriate agency immediately, he could not take advantage of the statutory grant of use and derivative use immunity in Section 311(b)(5), which was intended to implement the Fifth Amendment privilege against self-incrimination. We did not present this question in the petition for a writ of certiorari. See Pet. 2, 8.

for each offense.[15] In determining the amount of the penalty or any settlement thereof, the Secretary is to take into account "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." [16]

Civil penalties recovered in proceedings brought under Section 311(b)(6) are paid into the revolving fund established by Section 311(k), along with re-

[15] Section 311(b)(6) was amended by Sections 58(a)(7) and (8) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1594, to provide that the "person in charge" of a facility is liable for a civil penalty in addition to the owner or operator of the facility.

[16] Section 311(b)(6) was further amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to permit the Administrator of EPA to bring an action directly in the district court to recover a civil penalty of up to $50,000 against the owner, operator, or person in charge of a vessel or facility from which a substance is dicharged in violation of Section 311(b)(3). The amount of the penalty is to be determined by the same three factors utilized by the Coast Guard in assessing a penalty administratively, as well as the "standard of care manifested" and efforts to "minimize or mitigate the effects of such discharge." The penalty may be in an amount of up to $250,000 if the Administrator can show willful negligence or misconduct on the part of the defendant. This provision for the Administrator of EPA to recover a much larger civil penalty in an action in the district court is designed for more serious discharges, and it cannot, by its terms, be utilized if the Coast Guard has already assessed a penalty administratively. EPA recently issued regulations and entered into a memorandum of understanding with the Coast Guard governing the assessment of civil penalties in the district court. 44 Fed. Reg. 50766 (Aug. 29, 1979).

coveries under Section 311(f) from owners or operators of the costs incurred by the United States in cleaning up discharges. Thus, as the court of appeals acknowledged (Pet. App. 9a), the collection of civil penalties in all cases helps defray the cost of cleaning up those oil spills for which the government's clean-up costs are not otherwise recoverable—*e.g.*, where the discharge cannot be traced to a particular source; where the discharge is caused by an act of God, an act of war, or negligence on the part of the United States; where the owner of a facility at which the discharge occurred is insolvent; or where the clean-up costs exceed the limitations on liability established in Section 311(f). Moneys from the revolving fund are also used for implementation of the National Contingency Plan for removal of oil and hazardous substances. See Sections 311(c)(2) and 311(k).

By the operation of these sections, the civil penalty provision furthers the FWPCA's goal of pollution-free water by imposing a type of absolute or enterprise liability on those who engage in activities creating a risk of the discharges the FWPCA was intended to prevent—and by imposing that liability only where the risk has manifested itself in an actual discharge—in order to assist in the funding of clean-up efforts generally. See *United States* v. *Marathon Pipe Line Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978). This reflects a congressional judgment that the industry concerned, rather than the public, should bear the direct costs of the water pollution caused by discharges. *Ibid.*; see also *United States* v. *Tex-Tow, Inc.*, 589 F.2d 1310, 1314-1315 (7th Cir. 1978).

The civil penalty was also expected to have an incremental impact in deterring discharges. S. Rep. No. 91-351, *supra*, at 16. In many cases, the amount of the penalty will be considerably less than the clean-up costs. The clean-up costs (and potential liability to third parties for damages under state or federal law for injury to property)[17] would operate as a significant deterrent to such discharges. But Congress anticipated that there would be other discharges that, although not lending themselves to effective clean-up, would nevertheless "present a hazard to the water environment" (*ibid.*). The civil penalty was expected to discourage these discharges for which clean-up costs were not likely to be recovered (*ibid.*).[18] In those cases in particular, but to an extent in all

[17] Section 311(*o*) provides that nothing in Section 311 shall be construed to affect the liability under federal or state law of an owner or operator of a vessel or facility to the owner of property that is damaged by an oil spill.

[18] At the time of the discharge in this case, Section 311 (b) (2) (B) provided for the recovery of a civil penalty—in effect, liquidated damages—from the owner or operator of a facility or vessel from which a *hazardous substance* was discharged if the Administrator of EPA determined at the time he designated the substance as hazardous that it was not actually removable from water. This provision, enacted in 1972, was expected to discourage discharges of hazardous substances because each carrier or handler would evaluate the risk of discharge and determine whether the potential penalty made engaging in the risk-prone activity worthwhile or whether a higher standard of care was in order. S. Rep. No. 92-414, 92d Cong., 1st Sess. 66 (1971); see also 124 Cong. Rec. S18995 (daliy ed. Oct. 14, 1978). There was, contrary to the court of appeals' apparent belief (Pet. App. 8a-9a), no similarly distinct provision for liquidated damages in the case of *oil* discharges that could not readily be cleaned up in a particular case. The "liquidated damages" provision in Section 311 (b) (2) (B) was effectively repealed by Subsection (b) (3) of the Federal Water Pollution Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467. The civil penalty assessed under Section 311 (b) (6) can, however, serve the same function by forcing the handler or carrier of oil or hazardous substances to take the monetary cost of a civil penalty into account and to exercise a higher standard of care as a result.

cases, the civil penalty helps to prevent harmful spills "by making care more economical than carelessness" (Pet. App. 29a n.9, quoting *United States* v. *General Motors Corp.*, 403 F. Supp. 1151, 1162 (D. Conn. 1975)). See also *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830, 841 (E.D. Pa. 1977), aff'd *sub nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978). And, as the court of appeals conceded (Pet. App. 16a), the penalty may also be viewed as compensation to the United States (acting *parens patriae*, to preserve the integrity of the Nation's waters for the benefit of the general citizenry) for the presumed ecological harm to the waters resulting from the discharge, even though it may be cleaned up promptly. See *United States* v. *W. B. Enterprises*, 378 F. Supp. 420, 422-423 (S.D. N.Y. 1974); see also *United States* v. *Eureka Pipeline Co.*, 401 F. Supp. 934, 940 (N.D. W. Va. 1975). "[T]he Congress obviously believed: (a) that no clean up effort could be complete because, after discharge, it is impossible to guarantee against residual harm from quantities of oil too small or too well dispersed to be detectable; and (b) that even the transitory pollution of waters was deleterious to the environment." *United States* v. *Atlantic Richfield Co.*, *supra*, 429 F. Supp. at 837.

II.

THE PENALTY ASSESSED UNDER SECTION 311 (b)(6) IS PLAINLY CIVIL IN NATURE, FURTHERING THE ACT'S REMEDIAL PURPOSES

The Fifth Amendment provides that no person shall be compelled "in any criminal case" to be a witness against himself. The court of appeals held that a penalty provided for in Section 311(b)(6), although denominated "civil" is, in reality, "criminal in nature" and that the Fifth Amendment therefore precluded the use in proceedings to assess and collect the penalty of the notice of the discharge respondent was required by Section 311(b)(5) to give to the "appropriate agency" of the federal government. The conclusion may follow if the premise is correct (but see *California* v. *Byers*, 402 U.S. 424 (1971)). But, in our view, the court below wrongly characterized the proceeding in suit as a "criminal case" for purposes of the Self-Incrimination Clause.

"The question of whether a given sanction is civil or criminal is one of statutory construction." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); accord, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938); cf. *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 16-17. This is not to say, of course, that Congress could effectively dispense with applicable constitutional protections merely by attaching the "civil" label to what is otherwise unquestionably a criminal sanction. *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974); cf. *Bell* v. *Wolfish*, *supra*, slip op. 17 n.20. The proper judicial inquiry in any given case is whether Congress intended the finding of liability under the statutory

provision and the adverse effect on the person involved—here, a monetary penalty—to carry with them the usual implications or consequences of an adjudication of guilt under the criminal law. Among these are the stigma that is intended to attach following a conviction, the legitimacy of characterizing the adverse consequences as punishment, the satisfaction of whatever retributive impulses may underlie the criminal law, and, in appropriate cases, the imposition of disabilities or restraints, such as imprisonment or other custody, expulsion from the jurisdiction, or disqualification from the practice of a profession.

Where Congress intends a finding of liability under a particular statutory provision to carry these consequences normally associated with conviction for commission of a criminal offense, the determination of liability cannot occur, and the penalty provided cannot be imposed, without the protection afforded by the Constitution in criminal cases or prosecutions. But evidence of such congressional intent is wholly lacking with respect to Section 311(b)(6).

A. Section 311(b) On Its Face Manifests A Clear Congressional Intent That the "Civil Penalty" Provided in Section 311(b)(6) Is Civil for Constitutional Purposes

The very language of the Act here, which must be the starting point in statutory interpretation, *Perrin* v. *United States*, No. 78-959 (Nov. 27, 1979), slip op. 4; *TVA* v. *Hill*, 437 U.S. 153, 173 (1978), amply demonstrates that the penalty is not criminal. Congress used the term "civil penalty" in describing the assessment under Section 311(b)(6). It must be assumed, absent compelling evidence of congressional

intent to the contrary, that this term was used advisedly. Congress must be presumed to be aware of the traditional distinction between civil and criminal sanctions, not merely with respect to the procedural protections that must be afforded, but also in the vastly different legal and societal consequences that follow when one is adjudged guilty of a crime on the one hand and, on the other, has paid a mere monetary penalty under a regulatory statute.

For this reason, as Judge Friendly stated, "[w]hen Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word." *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974). This Court has, as a result, repeatedly upheld monetary penalties designated by Congress as civil penalties against contentions that they were actually criminal in nature. See *e.g.*, *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151-154 (1956); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-552 (1943); *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 400, 402-403; *Chicago, B. & Q. Ry.* v. *United States*, 220 U.S. 559, 577-579 (1911); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 338-339 (1909); *Hepner* v. *United States*, 213 U.S. 103, 108-111 (1909).

The administrative procedure for assessment of the penalty under Section 311(b)(6) is also indicative of a congressional intent that the penalty be civil. In *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), for example, in which the question presented was whether

a 50% penalty on a federal income tax deficiency was a criminal penalty and therefore barred under the circumstances by the Fifth Amendment protection against double jeopardy, the Court stated:

> That Congress provided a distinctly civil procedure for the collection of the additional 50 percentum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not appply.

303 U.S. at 402.

But it is not necessary to rely on the language of Section 311(b)(6) alone to determine from the face of the Act that the penalty is civil. In Section 311(b)(5), the *immediately preceding section*, Congress provided for what are clearly criminal sanctions for those who fail to notify the appropriate agency of the federal government of a prohibited discharge:

> Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both.

Thus, when Congress wished to impose a criminal sanction in the Act, it knew how to do so.

Even more significantly for present purposes, however, is Congress' treatment of the Fifth Amendment implications of the self-reporting requirement in Section 311(b)(5). To safeguard the Fifth Amend-

ment privilege, Congress expressly provided in that section that the compelled notification, or information obtained by the exploitation of that notification, shall not be used against the reporting person "in any criminal case." The quoted phrase is, of course, drawn verbatim from the Self-Incrimination Clause. Thus, when Congress termed the monetary assessment in Section 311(b)(6), the very next section, a "civil penalty," it must have been of the view that a proceeding under Section 311(b)(6) is not a "criminal case" for purposes of the immunity granted by Section 311(b)(5) or, therefore, for purposes of the Fifth Amendment. When Congress has shown such a sensitivity to Fifth Amendment concerns by including an express grant of immunity (compare *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968)), and characterized a sanction provided in the same statutory scheme as a "civil penalty" that was intended to be outside of the protection afforded by the statutory and Fifth Amendment immunity, the statutory characterization of the penalty as civil is especially compelling.[20]

[20] Commandant's Instruction 5922.11B, issued in 1974, provides that there is no statutory immunity from the use of the notification in a civil penalty proceeding (App. 2a, *infra*). The administrative construction that a "civil penalty" proceeding is not a "criminal case" for purposes of the statutory (and, therefore, the constitutional) immunity "should be followed unless there are compelling indications that it is wrong." *E.I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Finally, the provision for payment of penalties assessed under Section 311(b)(6) into the revolving fund established by Section 311(k) to defray costs of administering Section 311 further demonstrates a remedial, not punitive purpose. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549-550 (1943); *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 401.

Thus, in a number of different ways, Section 311(b) unmistakably reveals a congressional intent that the civil penalty in Section 311(b)(6) is indeed civil. This conclusion is reinforced by the decisions of a number of courts that a proceeding under Section 311(b)(6) is not a "criminal case" for purposes of the statutory grant of immunity in Section 311(b)(5), which, as noted above, implements the Fifth Amendment privilege. See *United States* v. *Allied Towing Corp.*, 578 F.2d 978 (4th Cir. 1978); *United States* v. *LeBeouff Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977); *Apex Oil Co.* v. *United States*, 530 F.2d 1291, 1293 n.7 (8th Cir.), cert. denied, 429 U.S. 827 (1976); *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977), aff'd *sub. nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978).[21]

[21] None of these cases involved the possible application of the Fifth Amendment privilege because the defendants were corporations, which do not enjoy the privilege. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 71 (1974). However, because Section 311(b)(5) uses the phrase "in any criminal case" drawn from the Fifth Amendment and was presumably

The court of appeals determined (Pet. App. 9a, 12a), however, in looking to the face of the statute, that a punitive intent—and therefore an intent to impose a criminal sanction—was indicated by the statutory language that a civil penalty "shall be assessed" for a violation. To be sure, the Coast Guard Instructions relied upon by the court of appeals—as well as those actually in effect at the time—support the view that Congress intended that some penalty be assessed in all cases. See A. 38-40; App., *infra*, 1a. But it does not follow that the provision is criminal in nature. The approach may simply be to impose a type of enterprise liability on the basis of the activity engaged in by the person generally—the storage, transportation, processing, or other handling of oil or hazardous substances—which creates an inherent risk of ecological harm, rather than to focus on the degree of fault underlying the specific act or omission at the time of the discharge actually occurred.

The court of appeals also found a punitive tone in the Commandant's Instructions, which give content, *inter alia*, to the phrase "gravity of the offense," one of the factors to be taken into account under the statute in determining the amount of the penalty to be assessed. As implemented in the Instructions, this factor embraces such considerations as the amount of oil discharged, whether the discharge was intentional or negligent, and the prior record of the person

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intended thereby to have the same scope (both for individuals and corporations) as the constitutional privilege, these cases reflect a judicial consensus of the underlying nature of the civil penalty in Section 311(b)(6) that is relevant here.

involved.[22] But, the amount of the oil discharged is clearly relevant if the penalty is viewed as compensation to the government for the ecological harm that is presumed to follow an oil spill, even one that is cleaned up promptly. See page 25, *supra*. So, also, the size of the spill is relevant in allocating the costs of government clean-up and stand-by preparedness measures funded by Section 311(k) to those who, as demonstrated by the magnitude of the particular spill, present the greater risk of the ecological harm Section 311 is designed to prevent.

Similarly, the prior record of the person involved is directly pertinent to the remedial purpose of preventing discharges. A long history of discharges confirms that the person's activities present a greater risk of ecological harm than do the activities of others and that a larger portion of the government's costs associated with administering Section 311 should therefore be allocated to that person. By the same token, if the discharge was intentional or negligent (a factor the Coast Guard instructions also take into account), this activity demonstrates a sufficient disregard for the purposes of the Act, and therefore a sufficient possibility of future harm, such that a proportionately greater penalty is warranted to further the purpose of preventing spills.[23]

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[22] Although the Instructions on which the court relied and those actually in effect at the time are differently worded, these considerations are generally contained in both. See A. 38-40; App., *infra*, 2a-3a.

[23] The court of appeals' conclusion that taking the degree of culpability into account in determining the *amount* of a penalty to be assessed demonstrates an intent to impose

Thus, nothing on the face of Section 311 or the Coast Guard's enforcement of it indicates an intent in the least inconsistent with Congress' characterization of the penalty as civil or with the section's remedial purposes.

B. The Penalty Provided in Section 311(b)(6) Is Also Civil Under the Test Set Forth In *Kennedy* v. *Mendoza-Martinez*

In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the Court held punitive a section of the Nationality Act of 1940 which "automatically strip[ped] an American of his citizenship * * * whenever [he] depart[ed] from or remain[ed] outside the jurisdiction of this country for the purpose of evading his military obligations." *Id.* at 166. Accordingly, the Court held that this punishment could not be imposed "without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments." *Ibid.* That result is hardly relevant here. Nor is the primary basis on which it was reached—the Court having concluded that the legislative history of the provision afforded "conclusive evidence of congressional intent" to treat the sanction of de-nationalization as punishment. *Id.* at 169. But the Court went on to identify seven factors useful in determining whether an Act of Congress is penal or regulatory in character (*id.* at 168-169; footnotes omitted).

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criminal sanctions is, of course, inconsistent with the court's earlier conclusion (see page 10, *supra*) that assessment of some penalty in every case without regard to fault (culpability) reflects a punitive intent.

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

In the present case, the court below invoked this passage to support its conclusion that the Section 311(b)(6) penalty is criminal in nature, and we accordingly consider the several factors here.

1. Whether the sanction involves an affirmative disability or restraint

This factor clearly points to the remedial nature of the Section 311(b)(6) penalty. The type of "affirmative disability or restraint" to which the Court referred was one imposed on *personal liberty*, not the adverse consequences of a monetary assessment. This is evidenced by the Court's citation (372 U.S. at 168 n.22) to *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), and *United States* v. *Lovett*, 328 U.S. 303 (1946). The former case held that a statute barring from the practice of law in federal courts any person who did not subscribe to an oath that he had not been an active supporter of the Confederacy consti-

tuted punishment for past conduct that was or may have been criminal and was therefore a prohibited *ex post facto* law. Similarly, *Lovett* held that a statute barring the payment of certain named government employees constituted punishment for their supposed subversive activities "without the safeguards of a judicial trial," 328 U.S. at 316, and was therefore a prohibited bill of attainder. *Id.* at 316-318. Cf. *Bell* v. *Wolfish*, *supra*, slip op. 17 n.20 (suggesting that certain restrictions on the liberty of pretrial detainees "may on [their] face appear to be punishment," but that they may in fact be incidents of a lawful nonpunitive governmental objective).

Monetary penalties, on the other hand, do not impose affirmative disabilities or restraints under the *Mendoza-Martinez* analysis. This is indicated by the Court's citation (372 U.S. at 168 n.22) to *Flemming* v. *Nestor*, *supra*, by way of contrast to *Ex parte Garland*, *supra*, and *United States* v. *Lovett*, *supra*. In *Flemming* v. *Nestor*, *supra*, the Court upheld the statutory termination of social security benefits of a person who had been deported because of past membership in the Communist Party. Finding an absence of compelling evidence of punitive intent, the Court rejected contentions that the provision was an *ex post facto* law or bill of attainder and that it resulted in punishment without benefit of a judicial trial. 363 U.S. at 612-621. Significantly, the phrase "affirmative disability or restraint" used in *Mendoza-Martinez* is drawn from a passage in *Flemming* v. *Nestor* (372 U.S. at 617) in which the Court cites *Wong Wing* v. *United States*, 163 U.S. 228 (1896) and *Cummings* v.

Missouri, 71 U.S. (4 Wall.) 277 (1866), both of which involved restrains on liberty,[24] and notes that *Flemming* v. *Nestor* itself involved no such "affirmative disability or restraint."

Thus, the court of appeals erred in concluding that because a monetary penalty may inflict a "pocket-book deterrence or restraint on the recipient" (Pet. App. 13a-14a, quoting *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 518 F.2d 990, 1001 (5th Cir. 1975), aff'd on other grounds, 430 U.S. 442 (1977)), the first of the *Mendoza-Martinez* factors offers "little indication as to Congress' intent" (Pet. App. 14a). A "pocket-book" impact distinctly points to a remedial rather than punitive intent.

2. Whether the sanction has historically been regarded as punishment

This factor, too, clearly supports the remedial, noncriminal nature of the penalty provision. As the Court stated in *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 400:

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as

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[24] *Wong Wing* invalidated a statute providing for imprisonment at hard labor, without a criminal trial to establish guilt, of a person unlawfully in the United States, and *Cummings* v. *Missouri* invalidated as an *ex post facto* law a state constitutional provision barring from the clergy any person who failed to subscribe to an oath that he had never supported the Confederacy. *Dent* v. *West Virginia*, 129 U.S. 114 (1889), also cited in *Flemming* v. *Nestor* at the pertinent page, involved a defendant who had been indicted and convicted and is relevant only for its discussion of *Cummings* v. *Missouri*.

> enforcible by civil procedings since the original revenue law of 1789. * * * In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

Unlike the historically punitive sanction of exile involved in *Mendoza-Martinez* itself (see 372 U.S. at 168 n.23), and the similarly criminal sanctions involved in the other cases cited in *Mendoza-Martinez* on this point—imprisonment at hard labor, *Wong Wing* v. *United States, supra; Ex parte Wilson*, 114 U.S. 417, 426-429 (1885); *Mackin* v. *United States*, 117 U.S. 348, 350-351 (1886) (discussing *Ex parte Wilson*), and exclusion from a profession, *Cummings* v. *Missouri, supra*—monetary penalties have traditionally been recognized as appropriate civil remedies.

3. *Whether the sanction comes into play only on a finding of scienter*

This factor furnishes no support whatever for the argument that the penalty in Section 311(b)(6) is criminal in nature, because there is no *scienter* requirement for the imposition of a civil penalty under that section. The court of appeals agreed, "at first blush" (Pet. App. 14a), but then resorted to the somewhat inverted logic that Section 311(b)(6) is punitive in this regard because Sections 13 and 16 of the Rivers and Harbors Act of 1899, which may impose criminal sanctions for the discharge of oil and hazardous substances, likewise do *not* contain a *scienter* requirement (Pet. App. 14a, citing *United States* v. *White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974)). We, of course, recognize that a statute may be criminal although it contains no *scienter* requirement. Yet, the absence of such a requirement in Section 311(b)(6) *tends* to establish that the measure is remedial, not criminal.

The court of appeals was also influenced (Pet. App. 14a) by the fact the Commandant's Instructions appeared to contain a *scienter* element in determining the amount of the penalty to be assessed in a given case. See A. 38-40; App., *infra*, 2a-3a. But the only pertinent statutory factor is the "gravity of the offense." This is not the equivalent of a *scienter* requirement. As the implementing instructions make clear, this factor can embrace such considerations as the amount of oil discharged, the degree of care exercised by the discharger, and whether the discharge was intentional. The inquiry under *Mendoza-Martinez*, on the other hand, is whether the penalty "comes into play *only* on a finding of *scienter*." 372 U.S. at 168 (emphasis added). This question must be answered in the negative, both as it pertains to the assessment of at least some penalty and the determination of its amount.

4. *Whether the sanction's operation will promote the traditional aims of punishment—retribution and deterrence*

The court of appeals concluded (Pet. App. 15a) that the deterrence factor does not come into play under Section 311(b)(6) to a significant degree be-

cause the deterrence of spills under the section as a whole results from the provision in Section 311(f) for the recovery of clean-up costs from the owner or operator. We agree that the potential for assessment of a civil penalty will have a relatively small deterrent effect where the potential clean-up liability is substantial. But, as noted above (see pages 24-25, *supra*), Congress expected Section 311(b)(6) to serve some deterrent function, especially where the oil could not readily be removed. This prospective deterrent effect was expected to result because handlers of oil and hazardous substances would make an economic calculation whether the possibility of a penalty warranted the taking of certain risks in the handling of those materials, and it was anticipated that those responsible would be impelled by economic considerations to take protective measures.

Such essentially regulatory deterrence, by imposing additional costs or responsibilities in connection with doing business for the purpose of accomplishing remedial goals, does not render the sanction criminal. This is clear, for example, from *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 337-338 (1909):

> [The Senate] report leaves no doubt that the sole purpose of § 9 was to impose a penalty, * * * to secure the efficient performance by the steamship company of the duty to examine [aliens] in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress to exclude from the United States aliens afflicted with loathsome or dangerous contagious diseases as defined in the act. The contention that because the exaction which

> the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, therefore its enforcement is necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion.

The deterrent effect of which the Court spoke in *Mendoza-Martinez* must therefore be more than that which would predictably follow from the assessment of a penalty for remedial purposes. It must, instead, result from an *in terrorem* effect akin to that of being adjudged guilty of a criminal offense or from a monetary penalty far in excess of that reasonably related to the remedial purposes of the provision, as in the two cases cited in *Mendoza-Martinez* (372 U.S. at 168 n.25, citing *United States* v. *Constantine*, 296 U.S. 287 (1935), and *Trop* v. *Dulles*, 356 U.S. 86 (1958)).

Although the court of appeals did not find a prohibited deterrent function in the civil penalty, it did find that Section 311(b)(6) manifested a retributive purpose, at least as implemented by the Coast Guard Instructions. In setting the amount of penalty, the Instructions take into account the gravity of the violation, the degree of culpability, and the prior record of the party and preclude consideration of good faith, the absence of fault, or subsequent clean-up efforts.

As noted above, however (see pages 32-33, *supra*), the gravity of the violation, the prior record, and the degree of culpability are all relevant to the allocation of the special costs of administering Section 311

to those who engage in the activity that creates the risk of the ecological harm the statute was designed to prevent, whatever the nature of the conduct (or absence thereof) at the specific moment of the discharge. Similarly, subsequent cleanup efforts do not erase the fact that the occurrence of the discharge itself confirms that the particular facility poses a risk of discharge or the possibility that ecological harm may have resulted to the waters notwithstanding the clean-up efforts. This is in no sense retributive purpose.[25] Where, as here, the statute's aim is to reach the conduct engaged in, rather than the person engaging in it, it is remedial, not punitive. See *Flemming* v. *Nestor*, *supra*, 363 U.S. at 616, quoting *Cummings* v. *Missouri*, *supra*, 71 U.S. (4 Wall.) at 320 (there must be a persuasive showing of a purpose "to reach the person, not the calling" to find the provision punitive or criminal in nature).

5. ***Whether the behavior to which the sanction applies is already a crime***

The court below found here a clear indication that the Section 311(b)(6) penalty is criminal for present purposes because Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, makes criminal the discharge of refuse of any kind into the navigable waters of the United States. But the fact that criminal sanctions apply under another statute, passed at a distant time, has little bearing on Congress' intent in enacting Section 311(b)(6). " 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.' " *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 235, quoting *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 399. Once again, a consideration of the facts in *Mendoza-Martinez* is in order. In that case, the Court found that Congress had enacted the expatriation provision for the specific purpose of imposing *additional punishment* for conduct that was already criminal under the Selective Service laws but which could not be prosecuted when the violator was outside the country. 372 U.S. at 170-184. There was therefore a clear nexus between an underlying criminal offense and the particular disability.

Such a nexus was also plain in the three cases cited by the Court by way of explaining this factor. All three statutes involved premised liability for a monetary sanction on a finding that the person engaged in conduct that was criminal under a statutory provision referred to in the very section that provided for the monetary penalty. 372 U.S. at 168 n.26, citing *Lipke* v. *Lederer*, 259 U.S. 557, 562 (1922); *United States* v. *La Franca*, 282 U.S. 568, 572-573 (1931); *United States* v. *Constantine*, *supra*, 296 U.S. at 295. See also *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971); compare *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 236 n.6. It is apparent, then, that the Court in *Mendoza-Martinez* had in mind something substan-

[25] This factor must also be considered in light of the facts of *Mendoza-Martinez* itself, in which the legislative history made unmistakably clear that Congress acted for the repeatedly expressed purpose to *punish* those who left the country in time of need. 372 U.S. at 170-184. See also *Trop* v. *Dulles*, *supra*, 356 U.S. at 96 (plurality opinion).

tially more than the fact that the conduct involved might also be criminal under some other statute or provision. There must be a basis for concluding that Congress specifically intended the sanction in question to be additional *punishment* for engaging in that criminal conduct. There is no basis for such a conclusion here.

Moreover, the Court has held that the fact that a concededly criminal provision falls in a different part of the statutory scheme than the provision whose penal or remedial character is in issue weighs in favor of a finding that the provision in issue is not criminal. *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 236. Viewed from this perspective, the fact that the conduct here covered by Section 311(b)(6) may also be criminal under the Rivers and Harbors Act, enacted some 70 years earlier, attenuates any relationship to underlying criminal activity to the breaking point. There is no mention of the Rivers and Harbors Act in Section 311(b)(6), nor is there any indication that Congress intended for the civil penalty assessed under Section 311(b)(6) to be an additional punishment for a violation of that statute.[26]

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[26] In fact, although the committee reports do not elaborate, a principal motivation for the incorporation of a statutory grant of immunity under Section 311(b)(5) against the use "in any criminal case" of information about discharges required to be furnished under that section was no doubt to prevent the use or derivative use of that information under the Rivers and Harbors Act. See, *e.g.*, *United States* v. *Republic Steel Corp.*, 491 F.2d 315 (6th Cir. 1974); *United States* v. *Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972); see

6. *Whether an alternative purpose other than punishment may rationally be ascribed to the sanction*

Although sanctions that have no conceivable legitimate purpose other than to punish are considered punitive in nature, *Kennedy* v. *Mendoza-Martinez*, *supra*; *Trop* v. *Dulles*, *supra*, the sanction will not be regarded as punitive or criminal in nature if the statute may rationally be thought to have another purpose. *Flemming* v. *Nestor*, *supra*, 363 U.S. at 615-617. In the present case, it is clear that a number of alternative purposes may rationally be ascribed to Section 311(b)(6). The court of appeals conceded as much (Pet. App. 16a). It specifically noted the remedial aspects of the penalty resulting from the payment of moneys recovered into the revolving fund established under Section 311(k), which is utilized to defray the costs of administering the program. See also *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 237; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 550 (1943); *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 401. The court also conceded the reasonableness of the government's argument that the penalty compensates the United States for tortious

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generally Comment, *Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases*, 55 B.U.L. Rev. 112, 114-118 (1975). The fact that Congress termed the penalty in Section 311(b)(6) a "civil penalty" demonstrates that it did not view a proceeding for the assessment of such a penalty as the equivalent of a "criminal case" for purposes of the statutory (and therefore the constitutional) grant of immunity.

damage to the environment (Pet. App. 16a, citing *United States* v. *W.B. Enterprises, supra*). However the court declined to accept this rationale because the factors involved in determining the amount of the penalty did not, in its view, reasonably relate to the possible damage to the environment.

But the statute by its terms states that the "gravity of the violation" is to be taken into account in determining the amount of the penalty, and this has, quite appropriately, been interpreted by the Coast Guard to involve a consideration of the amount of oil discharged. Plainly the amount of oil discharged may in general be though to be reasonably related to the ecological damage to the waters that could result even if the discharge was cleaned up promptly. At the very least, Congress, in addressing the generality of cases, could reasonably have so concluded. Finally, as discussed above, Section 311(b)(6) has the broad remedial purpose of encouraging compliance with the Act's "no discharge" policy through the imposition of a type of enterprise liability on those who engage in risk-prone activity.

7. Whether the sanction appears excessive in relation to the alternative purpose assigned

Where a monetary penalty is "grossly disproportionate" (*United States* v. *Constantine, supra*, 296 U.S. at 295) to the amount that could reasonably be imposed in furtherance of the asserted remedial purposes of the provision, the courts may construe

the penalty as punitive in nature. See also *Bell* v. *Wolfish, supra*, slip op. 17 n.20. However, it is well settled that a civil penalty need not be limited to the amount of the government's actual damages in order to constitute a remedial measure. *One Lot Emerald Cut Stones* v. *United States, supra*, 409 U.S. at 237 (forfeiture of goods for custom law violation); *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-154 (1956) ($2000 liquidated damages recoverable by government against fraudulent purchasers of surplus property without proof of actual damages); *United States ex rel. Marcus* v. *Hess, supra*, 317 U.S. at 550 (recovery of double damages by government for filing of false claims); *Helvering* v. *Mitchell, supra*, 303 U.S. at 401 (50% addition to tax deficiency).

Whatever the outer limits of this test, it is clear that a civil penalty of $250 in the present case is not so grossly disproportionate as to smack of punishment. In the vast majority of cases, even the maximum penalty of $5000 could not be considered excessive. Significantly, as well, the statute expressly requires that the penalty be tailored in amount to meet the "gravity of the violation" as well as the size of the business of the owner or operator charged and the effect of the penalty on his ability to remain in business. Thus, far from showing the type of cavalier disregard for the consequences of the penalty that might lead a court to find a punitive intent, Congress manifested a meticulous concern for the appropriateness of the penalty under the circumstances of the particular case.

The court of appeals concluded that the penalty nevertheless "could be excessive" in certain cases, at least where the owner or operator attempted in good faith to clean up and was not at fault for the discharge (Pet. App. 17a). If the statutory factors are properly applied, however, an accidental or otherwise innocent discharge should not result in as severe a penalty as would an intentional or negligent one (other things being equal), because the violation would not be so "grave." Moreover, even where the discharge is innocent or clean-up efforts are diligently pursued, these factors do not erase the fact of the discharge itself, nor do they necessarily erase all ensuing ecological harm (see page 42, *supra*). In any event, speculation that a penalty might prove excessive in some future case (the court of appeals did not expressly find the penalty excessive in *this* case) does not support the conclusion that Congress must have intended the sanction to be criminal in all cases. The more prudent judicial course would be to invalidate an excessive penalty in whatever case it may be imposed on the theory that it is inconsistent with the statutory scheme.

Thus, *each* of the factors enumerated by the Court in *Kennedy* v. *Mendoza-Martinez*, *supra*, supports the conclusion that the "civil penalty" under Section 311(b)(6) was intended by the Congress to be exactly that.

III.

THE PROCEEDINGS UNDER SECTION 311(b)(6) FOR ASSESSMENT OF A CIVIL PENALTY ARE NOT "QUASI-CRIMINAL" FOR PURPOSES OF THE FIFTH AMENDMENT PRIVILEGE

Respondent argued in the court of appeals (Appellant's Br. 11-22) that even if Section 311(b)(6) does not state a criminal offense for purposes of all constitutional protections applicable in criminal prosecutions, it should nevertheless be regarded as criminal for purposes of the Fifth Amendment privilege against compulsory self-incrimination. The court below did not specifically address this argument, although it did note (Pet. App. 18a n.7) that it was not deciding the question whether Section 311(b)(6) is criminal for any purpose other than the Fifth Amendment privilege—perhaps thereby suggesting that the privilege does have something of the broader reach respondent urged the court to consider.

Respondent primarily relied on *Boyd* v. *United States*, 116 U.S. 616 (1886); *Lees* v. *United States*, 150 U.S. 476 (1893); and *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971). Those cases, however, do not stand for the proposition that monetary penalties that are plainly civil in character should nevertheless be regarded as criminal in order to further the "policies" of the Fifth Amendment. The Amendment by its terms applies only to a "criminal case," and there must therefore be a dem-

onstration that the procedure for imposition of the penalty here is—or is part of—a "criminal case."

Boyd v. *United States*, *supra*, arose under Section 12 of the Act of June 22, 1874, ch. 391, 18 Stat. 188, which prohibited the fraudulent importation of merchandise and provided that a person violating the section "shall * * * be fined in any sum not exceeding $5000 nor less than $50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited." See 116 U.S. at 617. The government filed an information for forfeiture of certain goods, but did not file a criminal charge. The Court held that the Fifth Amendment attached in the forfeiture proceeding. But that conclusion was not based on a doctrine that forfeitures and monetary sanctions are generally "quasi-criminal" and that the Fifth Amendment privilege may uniformly be invoked in such proceedings. Instead, the Court premised its holding on the specific finding that the forfeiture of goods was one of the "penalties affixed to the criminal acts" prohibited by the statute. 116 U.S. at 634. The Court explained (*ibid.*):

> If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be.

It was on this basis alone that the Court stated that "proceedings instituted for the purpose of declaring the forfeiture of a man's property, *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal." 116 U.S. at 634 (emphasis added).

In *Lees* v. *United States*, *supra*, the Court likewise indicated that the statutory penalty could have been recovered in either a criminal or civil action. 150 U.S. at 479. The Court also stressed that the penalty was intended as punishment (150 U.S. at 480), and the statute in question referred to a violation as an "offence," Act of Feb. 26, 1885, ch. 164, Section 3, 23 Stat. 333, thereby underscoring the punitive nature of the penalty. Accordingly, the Court followed *Boyd* in concluding (150 U.S. at 480-481) that the action, though civil in form in the particular instance, was criminal in nature and therefore one in which the defendant could not be compelled to be a witness against himself. See also *United States* v. *Regan*, 232 U.S. 37, 47, 50 (1914); *Hepner* v. *United States*, 213 U.S. 103, 111-112 (1909).

Similarly, *United States* v. *United States Coin & Currency*, *supra*, held that the Fifth Amendment privilege is applicable in a forfeiture proceeding under the internal revenue laws where the forfeiture is intended to be imposed "only upon those who are significantly involved in a criminal enterprise." 401 U.S. at 721-722. See also *id.* at 718, quoting *Boyd*

v. *United States, supra,* 116 U.S. at 634 (proceeding for forfeiture of a person's property "by reason of offences committed by him" are in their nature criminal for Fifth Amendment purposes). This reading of *Boyd* v. *United States* and its progeny—that application of the Fifth Amendment privilege is limited to situations in which the monetary penalty or forfeiture is premised on commission of an underlying criminal offense—was expressly reaffirmed by the Court in *One Lot Emerald Cut Stones* v. *United States, supra,* 409 U.S. at 236 n.6.

Thus, in the cases upon which respondent relied in the court of appeals, the monetary penalty or forfeiture was dependent on the occurrence of an integrally related criminal offense and was, in actuality, but a form of punishment for the commission of that offense. See *In re Daley,* 549 F.2d 469, 474-475 (7th Cir.), cert. denied, 434 U.S. 829 (1977). This nexus to a criminal offense serves to illuminate the apparent rationale of these holdings: Although a civil penalty or forfeiture proceeding is not a "criminal prosecution" for purposes of the Sixth Amendment, it may, in appropriate circumstances, be considered part of a broader "criminal case" for purposes of the Fifth Amendment privilege—a "criminal case" that could fairly be thought to embrace not only the prosecution itself, but certain ancillary or closely related proceedings the government may pursue to exact additional punishment for the same underlying criminal conduct. And if the defendant is compelled to give information that will result in a finding of liability in

a civil penalty or forfeiture proceeding that is intended to be the practical equivalent of an adjudication of guilt in a prosecution for the criminal offense, he may, as a practical matter, effectively "incriminate" himself even if he is never formally prosecuted.

That rationale is inapplicable here. The civil penalty provision in Section 311(b)(6) lacks such a direct nexus to an underlying criminal offense; it is imposed for violations of Section 311(b)(3), which contains no criminal sanctions. There is no indication that it was also intended to be an alternative or additional means of punishing offenses under the Rivers and Harbors Act. Our case is like *Helvering* v. *Mitchell, supra,* in which the Court rejected the argument that a provision for a 50% penalty on income tax deficiencies was barred under the Double Jeopardy Clause following an acquittal on criminal charges of fraudulently evading income taxes, finding that the assessment was remedial, not punitive in character. The Court there observed that where the monetary penalty or forfeiture is remedial, the defendant does not have the protection of a number of procedural rights normally associated with the criminal process, including the Fifth Amendment privilege against compulsory self-incrimination. 303 U.S. at 404. The Court noted that it did not read *Boyd* v. *United States, supra,* or *Lees* v. *United States, supra,* as holding to the contrary "where the sanction involved is remedial, not punitive." 303 U.S. at 404 n.12 Here also (as explained in Parts I and II of the brief), the

civil penalty is remedial, not punitive. It follows that Section 311(b)(6) does not trigger the Fifth Amendment privilege.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Instruction 5922.11B issued by the Commandant of the Coast Guard on October 10, 1974, provides in pertinent part:

GUIDELINES FOR THE ENFORCEMENT OF THE FEDERAL WATER POLLUTION CONTROL ACT, SECTION 311

I. It is the policy of the Coast Guard to assess a civil penalty for every violation of Section 311(b)(3) of the FWPCA.

* * * * *

II. *Notification.*

* * * * *

(2) The notification required by Section 311(b)(5) confers a statutory immunity from exploitation of that notification in any criminal case upon the person required to notify the Coast Guard (i.e., "person in charge" [*U.S.* v. *Mobil Oil*, 4 ERC 1405]).

(3) Any employee of any corporation, firm, partnership, etc., who notifies the Coast Guard of a discharge in accordance with Section 311(b)(5), entitles his corporation to that same immunity from exploitation of the notification in any criminal case *if* (1) that employee is acting *for or on behalf* or as an *agent of* that corporation *and* (2) that corporation is "*in charge*" of that vessel or onshore or offshore facility from which oil is discharged.

(4) The notification does *not* confer a statutory immunity from exploitation of that notification in a civil penalty proceeding. Assessment of a civil penalty is not affected in any way by the fact that the owner or operator initially notified the Coast Guard of the discharge.

(5) Therefore, if, during any stage of the investigation or civil penalty procedure, it becomes evident that there has been a failure to notify, a litigation report should be referred to the U.S. Attorney for the district in which the alleged violation took place for possible criminal action. The referral should give notice that the Coast Guard will institute civil penalty procedures under Section 311(b)(6). The fact that criminal action for Section 311(b)(5) may be pending, or prospective, should not affect the civil penalty procedure in any way.

(6) The immunity from criminal action based on notification extends generally to the Refuse Act, 33 U.S.C.A. § 407. There is, however, no immunity from prosecution for perjury or giving a false statement.

* * * * *

III. *Assessment of Civil Penalty.*

* * * * *

C. *The gravity of the violation*—This factor encompasses multiple considerations. The following questions should be considered by the Hearing Officer in weighing the gravity of the violation:

(1) Was the discharge intentional?

(2) Could the discharge have been prevented using reasonable care?

(3) Was the discharge caused by an act or omission of a type previously attributable (according to official records) to that same owner/operator so as to place him on notice of the particular hazard?

(4) Was the cause of the discharge a violation of the prevention regulations? Note that a *separate* violation may have occurred under Section 311(j).

(5) Did the owner/operator take special steps to try to avert the specific discharge?

(6) Was the discharge "unforseeable" by an experienced owner/owner knowing the weather, sea conditions and equipment?

(7) Was there a minimum amount of oil discharged?

Note that an affirmative answer to 1-4 *increases* the gravity of the violation and an affirmative answer in 5-7 *decreases* the gravity of the violation. Under no circumstances may response action by the owner/operator be considered as decreasing the gravity of the violation.

D. *The size of the business and the impact of the civil penalty on the ability of the owner or operator to remain in business*

These two factors go hand in hand and should be considered together. By requiring the Coast Guard to consider these factors, Congress intended that companies not normally be forced out of business or seriously impaired in remaining in business by the size of the civil penalty. It should be noted that there is

no provision to decline to assess a penalty altogether, but only to consider the size of the business of the owner/operator *in assessing* the civil penalty. The basic objective to be gained is to assess a civil penalty which will not, if all other considerations warrant a maximum penalty, place the business of the owner/operator in jeopardy or seriously impair his ability to continue to operate.

The "notice" letter solicits information concerning the size of the business of the owner/operator and the owner/operator's own evaluation of the effect a preliminarily determined civil penalty would have. Before the notice letter is sent, the size of the business of the owner/operator should have been considered in making the preliminary determination. This is normally possible because the businesses are generally known to the Hearing Officer or his staff or may be discovered by a call to the appropriate Captain of the Port or district finance personnel. If information is then received from the party charged which differs materially from the Hearing Officer's preliminary consideration, the Hearing Officer should reevaluate and adjust the preliminary determination before making the assessment. If no information is received, or if information is received which does not differ materially from the Hearing Officer's preliminary consideration, no adjustment because of the size of the business or effect on ability to continue to operate should be made prior to assessment.

The Hearing Officer should properly consider the overall corporate structure of the owner/operator.

For example, a small, wholly owned subsidiary of a large conglomerate or holding company should be considered as the larger conglomerate for purposes of considering the size and impact of a civil penalty. Most frequently, when one-vessel corporations are controlled by a parent operating company, the size of the parent company shall control.

E. *Minimum penalty*—Neither assessing a zero penalty nor issuing a letter of warning in lieu of a penalty meets the requirements of the statute that a penalty "shall be assessed." If the facts warrant the imposition of a minimum penalty, then the penalty should be reasonably sufficient to motivate owners and operators of vessels and facilities to take adequate measures to prevent future unlawful discharges. In a district where pollution incidents are somewhat controlled, a figure of $150.00 per incident might be adequate to provide the necessary motivation. In another district where violations are flagrant and preventative measures frequently disregarded, a somewhat higher minimum figure might be required to provide the same motivation. However, it must always be remembered that in any one case, the assessed penalty must be based on its own set of facts.

* * * * *

I. *Use of records kept in accordance with Section 308 of the Federal Water Pollution Control Act in actions brought under Section 311(b)(5) and 311 (b)(6) of that Act*

Section 308 of the Federal Water Pollution Control Act provides authority for the Administrator of the Environmental Protection Agency to require the owner or operator of any point source to install, use, and maintain monitoring equipment or methods, to sample effluents, and to maintain records and make reports whenever required to carry out the objectives of several sections of the Federal Water Pollution Control Act, including Section 311. Section 308 also gives the Administrator of the Environmental Protection Agency or his authorized representative the right to have access to and to copy these records. These records are also to be available to the public except in certain narrowly defined situations.

Section 308 specifically cites a purpose of the record keeping as "determining whether any person is in violation of any . . . limitation, prohibition or effluent standard . . . of this Act . . ." It is appropriate to use records kept in accordance with Section 308 in the assessment of a civil penalty for discharges of oil or hazardous substances in harmful quantities under Section 311(b)(6) against the owner or operator and to use the records to notify under Section 311(b)(5). Use of Section 308 records should only be used where Section 308 information is forwarded to the Coast Guard by EPA and where obtaining such information is otherwise not practical. The Hearing Officer may obtain Section 308 records in cases where Coast Guard investigation is not practi-

cal, by initiating a request to the appropriate EPA Regional Administrator.

Use of Section 308 required records will not violate the discharger's constitutional rights against self-incrimination under the Fifth Amendment, because that provision applies only to criminal actions and the penalty assessed under Section 311(b)(6) is civil.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA, *Petitioner*,

vs.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT L. O. WARD

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA, *Petitioner,*

vs.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT L. O. WARD

NOTICE

Pursuant to the command of Supreme Court Rule 40(3), this brief omits references to the reports of the opinions below, a statement of the grounds of jurisdiction of this Court, a recitation of the Constitutional and Statutory provisions which this case involves, and the question presented for review, because the Respondent is satisfied with the accuracy of the statements in Petitioner's brief on those subjects.

STATEMENT

Ward does not disagree with the summary of material facts set forth in the Government's Brief on pages 5 through 12, for there is no factual dispute; a facility owned and operated by Ward, a sole proprietor,[1] sustained a small oil spill; the oil ran into a navigable stream as defined by Congress; Ward reported the spill as required by law; failure to have reported the spill is a criminal offense; once the spill was reported, the Coast Guard, pursuant to authority, imposed a $500.00 fine on Ward based entirely upon facts that Ward himself had been compelled to report or face criminal prosecution for failure to report; Ward challenged the imposition of the fine on the grounds that it violated his Fifth Amendment rights against self-incrimination; his administrative appeals were denied and after exhaustion of administrative remedies, he resisted the fine in a collection action in the District Court; the District Court ruled against him on his constitutional claim, but after jury trial, reduced the "civil penalty" to $250.00 because of his prompt and effective clean-up methods; Ward appealed and the Court of Appeals reversed, holding that the Government could not impose a "civil penalty" against Ward on an oil spill based upon information Ward himself was compelled to provide; this Court granted certiorari.

An analysis of the penalty phases and schemes of the Act denominated both civil and criminal is necessary, however, to understand that beyond any question the provision involved here is a "criminal penalty" or a "criminal

1. Since a corporation does not have a Fifth Amendment privilege against self-incrimination, *California Bankers Assn. v. Schultz*, 416 U.S. 21, 71 (1974), a corporate owner as operator of a facility that sustained a spill is not directly affected by the Court of Appeal's decision. *United States v. Allred Towing Corp.*, 578 F.2d 978 (4th Cir. 1978). Most oil spills are from corporate owners. See Petition for Certiorari, pp. 12-13.

case" for purposes of the Fifth Amendment self-incrimination clause.

Simply put, the statutory scheme is:

1. Section 311(b)(3) prohibits an oil spill into navigable waters of the United States;

2. Section 311(b)(5) requires the owner or operator of a facility wherein such a spill has occurred to report such spill immediately to an appropriate agency of the United States Government;

3. Failure to report the spill is a criminal offense punishable by a fine up to $10,000.00 and imprisonment for one year;

4. No notification received pursuant to Section 311(b)(5) shall be used against any person in any criminal case except for a perjury or false statement prosecution;

5. The owner or operator of a facility from which oil has been discharged shall be assessed a "civil penalty" by the Government in an amount not to exceed $5,000.00;[2]

6. In determining the amount of the penalty the Government (Coast Guard) is authorized to take into consideration the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation (A 39-40);

7. The Government is authorized to remove or arrange for the removal of any oil discharged into the navigable waters of the United States unless the Gov-

2. The penalty now may be as high as $50,000.00 under the provision of the Federal Water Pollution Act of 1978, Pub. L. No. 95-576, 92 Stat. 2468. The same three factors used by the Coast Guard to assess the amount of the penalty remain operative. Additionally, the penalty may be assessed as high as $250,000.00 for willful negligence or misconduct.

ernment is satisfied that the owner-operator of the facility from which the substance was discharged will properly do so. The Government's clean-up costs are paid out of a special revolving fund established by Section 311(k). Here, Ward cleaned up the spill, apparently to the satisfaction of the Government as well as the District Court below, which reduced his fine by half because of those efforts;

8. The owner of a facility which sustained a spill is liable to the Government for the actual costs incurred by the Government in a clean-up operation except where the discharge was caused solely by an act of God, war, negligence on the part of the United States, or an act or omission of a third party, Section 311(f). Funds recovered pursuant to this provision are deposited in the revolving fund established under 311(k);

9. The owner or operator in all cases remains liable to third parties for property damage.

Thus, the statutory scheme provides for strict liability for operators of facilities where an oil spill occurred. The owner was required to report the spill or face criminal prosecution for his failure to report. Once he reported the spill, however, the information he provided would be used to assess an automatic penalty that was to be as high as $5,000.00[3] unless there were mitigating factors.[4] The payment of the fine, however, does not relieve the operator's (a) liability for clean-up costs, (b) liability to property owners for damage inflicted as a result of the spill, (c) possible criminal prosecution for the spill.

---

3. A. 40.

4. The information provided is not "neutral" but definitely incriminating. Thus, the rule of *California v. Byers*, 402 U.S. 424 (1971) and *United States v. Sullivan*, 274 U.S. 259 (1927) is not applicable.

It is this statutory scheme that Ward believes, and the Court of Appeals found, makes the imposition of a "civil penalty" under 311(b)(6) a criminal case for purposes of the Fifth Amendment self-incrimination clause.

SUMMARY OF ARGUMENT

On March 23, 1975, a shut-in natural gas well-site operated by Respondent Ward sustained an oil discharge which, for purposes of this action, must be deemed to have reached navigable waters of the United States. Ward reported the spill in accordance with the statutory directive [33 U.S.C. §1321(b)(5)] to avoid the criminal penalty there imposed for failure to report an oil spill. Based solely upon Ward's report, the Coast Guard, pursuant to law, assessed a penalty against him of $500.00 for the spill itself, pursuant to 33 U.S.C. §1321(b)(6) [hereinafter referred to as §311(b)(6)]. A collection action was commenced in the United States District Court after Ward refused to pay, claiming that §311(b)(6) was violative of the Fifth Amendment to the United States Constitution. The District Court held against Ward. The Court of Appeals reversed. The Solicitor General petitioned for certiorari, which this Court granted.

The question presented is whether a proceeding under the Federal Water Pollution Control Act for the assessment of a "civil penalty" against the individual owner or operator of a facility, from which oil was discharged in violation of §311(b)(6), is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment to the Constitution, in which the Government is barred from using any information about the discharge that the individual is required by the Act to report under pain of criminal sanctions. At the time of the spill here

the maximum "civil penalty" was $5,000.00. Under present law the maximum "civil penalty" is $250,000.00.

Respondent's position is that the imposition of a "civil penalty" in these proceedings is violative of the Fifth Amendment Self-Incrimination Clause to the United States Constitution, in that it requires an owner or operator to report a spill, and following such report, a mandatory "civil penalty" is imposed.

Since the English common law, penalties, fines, and forfeitures have historically been treated as penal or punitive for purposes of avoiding self-incrimination. The English common law was that no man could be compelled to incriminate himself in any action to recover penalties or fines. During the development of the American colonial period, we incorporated the body of English common law into our legal system. The American colonies continued in the pre-constitutional period the English common law that the protection against self-incrimination was to be interpreted broadly and included actions to collect fines, penalties, and forfeitures as well as traditional criminal prosecutions. Following the formal adoption of the Self-Incrimination Clause and the Fifth Amendment, the American State and Federal Courts continued this interpretation.

This English, colonial and post-Fifth Amendment ratification doctrine that penalties, fines, and forfeitures were criminal cases for purposes of the protection against self-incrimination was expressly affirmed by this Court in 1886 in *Boyd v. United States.* It has been reaffirmed implicitly or explicitly on five occasions since *Boyd; Lees v. United States, Hepner v. United States, United States v. Regan, Helvering v. Mitchell,* and *United States v. United States Coin & Currency.*

Ward urges that the Fifth Amendment privilege against self-incrimination should apply in this case, because the spill penalty in question is at least "quasi-criminal" within the meaning of that term as set forth by *Boyd* and *United States v. United States Coin & Currency,* and thus invokes fundamental individual rights guaranteed by the Constitution.

Ward recognizes that in actions to collect fines, forfeitures, and penalties, the proceedings are not a criminal case for all purposes under the first Ten Amendments to the United States Constitution. Historically, this Court and other courts have held that actions to collect fines, forfeitures, and penalties, though civil in form, are in reality "criminal proceedings" for the purposes of the Self-Incrimination Clause of the Fifth Amendment.

The government claims that the self-incrimination clause applies only if the sanction is punitive, and that the test to determine whether the sanction is remedial (thus civil) or punitive (thus criminal) is governed by the factors enunciated in this Court's decision in *Kennedy v. Mendoza-Martinez.* Ward states that these factors are not controlling in this case, because (1) the factors were listed in *Kennedy v. Mendoza-Martinez* only as dictum and thus not binding, (2) the factors were not relied upon in the case where they were developed, and (3) employing the factors will lead to ambiguous and inconsistent results, as the history of judicial interpretation of this statute reveals.

However, Respondent believes, as the Court of Appeals did below, that even if the seven factors in *Kennedy v. Mendoza-Martinez* were applied in the instant case, the factors would point towards §311(b)(6) as being punitive or criminal in nature.

This result is reached, in part, because the penalty is imposed against an owner or operator without regard to fault or without regard to his clean-up efforts. The precise same conduct is made a violation of the criminal statutes, and the Coast Guard Commandant's Instructions on the factors which are to be considered in assessing the penalty clearly indicate a punitive, non-remedial function. For example, the Coast Guard is instructed to consider such factors as the gravity of the offense, the prior history of the alleged offender, and other punitive-type considerations. Those considerations that would indicate a remedial function such as cost of clean-up or clean-up operations by the owner or operator are expressly not included as factors in determining the penalty.

Although monies collected from the assessment of "civil penalties" go into a revolving fund to help pay clean-up costs, the owner-operator of the unit causing the spill still remains liable for those clean-up costs and liable for damage done to property.

Thus, an examination of the statutory scheme of enforcement and the Commandant's Instructions concerning enforcement clearly indicates a punitive, non-remedial function of §311(b)(6). This result is further supported by the common law tradition and the constitutional doctrine enunciated by this Court that actions to collect fines, penalties, and forfeitures have traditionally been considered a "criminal case" for purposes of the privilege against self-incrimination.

Thus, the decision of the Court of Appeals should be upheld, and no evidence furnished by the owner or operator pursuant to the statutory requirement of notifying the Coast Guard of a spill should be introduced into evidence against him in assessing a penalty under this Act.

ARGUMENT

PROPOSITION I:

PENALTIES, FINES, AND FORFEITURES HAVE HISTORICALLY BEEN TREATED AS PENAL OR PUNITIVE FOR PURPOSES OF AVOIDING SELF-INCRIMINATION:

1. The English Common Law Was That No Man Could Be Compelled to Incriminate Himself in Any Action to Recover Penalties or Fines;

2. The American Colonial, Pre-Constitutional Experience Incorporated in Practice This English Common Law Tradition and Interpreted the Protection Against Self-Incrimination Broadly, Including Actions to Collect Fines, Penalties, and, Forfeitures;

3. Following the Adoption of the Fifth Amendment the American State and Federal Courts Continued This Interpretation;

4. The English, Colonial and Post Fifth Amendment Ratification Doctrine That Penalties, Fines, and Forfeitures Were Criminal Cases for Purposes of the Protection Against Self-Incrimination Was Expressly Affirmed by This Court in *Boyd v. United States,* **116 U.S. 616 (1886).[5] It has been reaffirmed, implicitly or explicitly, on five (5) occasions since** *Boyd*: *Lees v. United States, Hepner v. United States, United States v. Regan, Helvering v. Mitchell,* **and** *United States v. United States Coin and Currency.*

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5. Mr. Justice Brandeis called *Boyd*, "A case that will be remembered as long as civil liberty lives in the United States." *Olmstead v. United States,* 277 U.S. 430, 477 (dissenting opinion).

A. Background to English Rule.

The protection against compulsory self-incrimination is of English origin, despite some attempts by scholars to attribute it to Continental theory.[6] Yet, it was the methods of the Inquisition in Europe under Innocent III that, when adopted in Britain, gave rise to the maxim, "*nemo tenetur prodere seipso*" (no man is bound to accuse himself). The Inquisition had been instrumental in Europe in diminishing the role of the accusatorial system of legal procedure. Under the latter system the burden of proof had been on the accuser, the Church or the Crown, to prove their case by independent evidence. The Inquisition method, by contrast, placed primary emphasis on proving the case by cross-examination (inquisition) of the accused. The Judge in essence became both prosecutor and fact-finder, seeking to establish his case primarily by the accused's own admissions. Yet, for various reasons, in England the Inquisition had less force. One, the English common law tradition to a large extent rejected punishment of crimes of the mind, such as heresy, which had been the prime object of the Continental Inquisition.[7] Moreover, there was less widespread religious dissent in England during the 12th and 13th Centuries than on the Continent, making inquisitorial procedures less popular. Most importantly, shortly before the beginning of the Inquisition in Europe, Henry II began initiating procedural reforms in the royal and common law courts of England. Such reforms as increasing the role of the jury as fact-finders as opposed to purely wit-

6. Leonard W. Levy, *Judgments, Essays on American Constitutional History*, (The Right Against Self-Incrimination), p. 269 (Quadrangle Books, Chicago, 1972).

7. While heresy and other religious crimes were prosecuted in England, such was not generally part of the common law tradition. Rather, such actions were generally dealt with in ecclesiastical or other prerogative courts.

nesses, the right of a jury determination of probable cause before being subjected to stand trial (the Assize), and increasing the public nature of trials, all gave impetus to making the English system of justice accusatorial rather than inquisitional. It was within this context that the concept developed in England that in order to prove the case against an accused, it must be done by evidence independent of the accused's own testimony. In fact, in England during this time and even in colonial America in subsequent years, an accused was not even competent to testify in his case for or against himself since he was an interested party and hence disqualified.[8]

Yet, in the royal and other prerogative courts of England, such as the Court of Star Chamber, the inquisitorial practices more common to the Continent continued to be used. Such courts were not bound by the common law tradition, yet possessed jurisdiction over any crime which they defined as such. It was, though, because of the growing common law accusatorial tradition that Englishmen had come to recognize their right not to accuse themselves. Under Henry II, the system of common law procedure rapidly expanded and centralized over the English nation. When confronted with the inequities of the inquisitional system in the prerogative courts, Englishmen began to assert their common law right against self-incrimination there as well. It was, then, in this clash between these diametrically opposed systems that the common law right against self-incrimination was established and began to grow to its present dimensions.

As originally understood in England, the right against self-incrimination was extremely broad. Indeed, the right

8. Levy, *ibid.*, p. 243; and Wigmore, *Treatise on Evidence*, I § 575; and William Searle Holdsworth, *A History of English Law* (London, 1903-38), IV, 193-196.

was successfully asserted not only in criminal cases, but also in cases where the Defendant or witnesses' answers would subject them to disgrace or self-infamy.[9] Yet, even in the context of criminal proceedings only, the right against self-incrimination was interpreted broadly. Specifically, from the date of its origin, it had been a cornerstone of the right that it applied in cases involving penalties and forfeitures, whether or not they were designated by the controlling lawmaker as civil or criminal.

B. The English Right Against Self-Incrimination Extends to Actions for Penalties and Forfeitures.

One of the first statements of this rule is found in *The Trial of Sir Jonathan Freind, State Trials,* Volume XIII, 1, at 17 (1696). Sir Jonathan was being tried for high treason. The prosecution attempted to swear in a witness, during which Freind interjected the question of whether such witness was a Roman Catholic or a Protestant. The Court, although indicating that the witness could answer if he so desired, admonished him that by doing so he might subject himself to a *penalty* because of the illegality of changing from the Protestant to Catholic faith. The Lord Justices

9. William Tyndale, *The Obedience of a Christian Man* (1528), reprinted in Henry Walker, Editor, *Doctrinal Treatises and Introductions to Different Portions of the Holy Scriptures,* by William Tyndale (Cambridge, 1848), p. 355; Doctrine of Thomas Cartwright and Others, in Albert Peel and Leland H. Carlson, Editors, *Cartwrightiana* (London, 1951), pp. 30-46 ff., 38 and documents about the same date in Thomas Fuller, *The Church History of Britain,* J.S. Brewer, Editor (Oxford, 1845), V, 107-108; *Trial of Nathaniel Reading, State Trials,* VII, 259-296-7 (1679); *Trial of Peter Cook, State Trials,* XIII, 311, 334-5 (1696); *Trial of Jonathan Freind, State Trials,* XIII, 1, 17 (1696); *East India Company v. Campbell,* 1 Vesey Sr. 246 (1749), *Blackstone's Commentaries,* III, 363, 370. For American cases showing that the common law right protected against self-infamy, see *State v. Bailly,* 2 N.J. 296 (1807); *Vaughn v. Perrine,* 3 N.J. 299 at 303 (1811); *Miller v. Crayon,* 2 Brevard (S.C.) 108 (1806); and *People v. Herrick,* 13 Johnson (N.Y.) 82 (1816).

then unanimously held that a witness was not bound to answer a question which could subject him to a *penalty or prosecution*:

> Lord Chief Justice: "No man is bound to answer any question that tends to make him *accuse himself* or subject him to any penalties." (Emphasis ours) At 17
>
> Lord Chief Justice Treby: ". . . I am of the same opinion, that no man is bound to answer any questions that will subject him to a *penalty,* . . . ." (Emphasis ours) At 17
>
> Justice Nevil: "I am of the same opinion, it does subject him to a *penalty*; . . . ." (Emphasis ours) At 17
>
> Justice Rakeby: "I think, it is not a question that can a right be imposed upon him; he may answer it if he will; but he is under no obligation to answer it, because it may tend to accuse himself of a crime for which he may be prosecuted, *and likewise will subject him to other penalties which the law cannot compel him to subject himself to.*" (Emphasis ours) At 17-18

In the case of *Smith v. Read,* 1 Atkyn 526, 529 (1736), a bill was brought for a forfeiture and a penalty for the rents and profits of an estate. The Plaintiff's bill sought to compel the Defendants to disclose facts which, if true, would have resulted in the Defendants' liability in regards to the forfeiture and penalty in question. In overruling the Plaintiff's discovery motion, the court said:

> "The law obliges no man to accuse himself, and for this . . . they cited 2 Cha. Ca. 8. Molings and Molings, . . . where a disability was held equivalent to a *penalty,* or *forfeiture* . . . ." At 526

Lord Chancellor "I think the defendant is not bound to discover, for there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or *anything in the nature of a penalty.*" (Emphasis added) At 527

Similarly, in the well-known case of *Harrison v. Southcoate,* 1 Atkyn 528, 529 (1751), 2 Vesey Sr. 398, 394-95 (1751), the court in ruling upon a similar discovery request said:

"The rule of law is, that a man shall not be obliged to discover what may subject him to a *penalty,* not what must only (1), and though upon the particular circumstances of the case, it might not possibly create a forfeiture, as it does not appear at present with certainty, whether such a discovery would create a forfeiture, yet eventually it may do so; and therefore with regard to so much of the plea as relies upon the statute of the 11 and 12 Will. 3 it ought to be allowed . . . ." (Emphasis ours) At 1 Atkyn 529

In *Duncalf v. Blake,* 1 Atkyn 52, 53 (1735), the defendant sought to recover on an insurance policy drawn by the Plaintiff to cover the Defendant's goods. When the Plaintiff sought to compel the Defendant to disclose the nature of his cargo on board, the Defendant refused to do so on the basis that if he did, his cargo might be subject to forfeiture under English laws prohibiting the exportation of wool from Ireland to any port other than Liverpool. That law provided:

"That none shall directly or indirectly export from Ireland into any foreign dominion any wool, and all offenders against this made liable to the *forfeiture* of the said wool, and also to the forfeiture of 100 pounds for every offense." (Emphasis ours) At 53

On the basis of liability to such a forfeiture, the Lord Chancellor sustained the Defendant's plea not to answer in regards to any such goods that might be subject to the penalty or forfeiture under the act.

In *Earl of Suffolk v. Green,* 1 Atkyn 450 (1739), the Plaintiff brought a bill to perpetuate the testimony of the Defendant, a party to a bond entered into by the Plaintiff's ancestors. The Plaintiff had charged that the Defendant witness had been guilty of usury on the bond. If true, it would have subjected the Defendant to monetary *fines* on the basis of such usury. In upholding the Defendant's demurrer to the Plaintiff's discovery on such a basis, the Court said:

"As to the first part, that it would subject the Defendants to a *penalty,* the demurrer is proper. . . ." (Emphasis ours) At 450

Similarly, in *Boteler v. Allington,* 3 Atkyn 453, 457 (1746), the Defendant demurred in a similar case on the basis that the discovery sought would subject him to a forfeiture and a penalty. In response, the Court ruled:

". . . I am of the opinion the defendant had a right to demur, not because of any consequence to the plaintiff, for the fact of which he seeks discovery may very easily be ascertainable by the bishop's register, but for the sake of the rule of the Court, that a defendant is not obliged by a discovery to subject himself to a *forfeiture, or anything in the nature of a forfeiture.*" At 456

"And therefore in all bills to stay waste, a plaintiff is not entitled to a discovery, unless he waives the double *penalty* which is treble damages by the statute of Gloucester. . . ." (Emphasis ours) At 457

The case of *East India Company v. Campbell* (Exchequer), 1 Vesey Sr. 246-47 (1749), is also instructive. In that case the Attorney general sought to discover how the Defendant came to possess certain goods, to which the Defendant would not answer on the basis that to do so would subject him to a *fine* or corporal punishment; or that if he did so, he would be liable for *penalties* based upon Parliamentary acts regulating trade. To such a plea the Court agreed. Moreover, in *Bird v. Hardwicke,* 1 Vernon 109 (1682), the bill charged that the Defendant, in order to raise the price of his wines and to retard the sale of Plaintiff's, caused the Plaintiff's wines to be seized on the basis that they were illegal as French imported wines. When the Plaintiff sued the Defendant to recover his damages, the Defendant refused to answer any discovery on the basis that to do so would subject himself to "forfeiture" under English laws prohibiting his conduct. The Court again sustained such a position, once again on the basis that a man is not bound to disclose that which would subject himself to a penalty or a forfeiture.

Thus, from the beginning, the right against self-incrimination has been applied in cases involving penalties and forfeitures. To be sure, the English example demonstrates that it was the threats of fines, penalties, and forfeitures that provided the bulk of litigation in regards to the right and was a major impetus in its development.

C. American Colonial Expression Prior to Ratification of Self-Incrimination Claims.

1. English common law adopted in colonies.

It was in this tradition that the American common law evolved. From the outset of colonial America, the right against self-incrimination was both invoked and upheld in cases involving penalties, fines, and forfeitures.

Indeed, it is clear that the colonists in America intended to incorporate the English common law into their system of law. All of the royal charters in the American colonies required that the laws of those colonies conform with English law. This necessity originated with the Virginia Charter of 1609 and was continued in the Pennsylvania Charter of 1681, the Georgia Charter of 1732, the Massachusetts Bay Charter of 1628-29, and the New York Charter of 1664.[10] This practice seems to have originated with the patent from Queen Elizabeth to Sir Humphrey Gilbert in 1578[11] and took the following form. That patent provided that Gilbert should have the power to govern the inhabitants of lands he settled and to exercise his control:

> "According to such state lawes and ordynaunces as shalbe by him (etc.) devysed or established for the better government of the said peoples as aforesaid to alwaies that the said statutes lawes and ordynances maye be as neare as conveniently may agreeable to the forme of the lawes and pollicies of England."[12]

The Charter to Sir William Raleigh, Gilbert's successor, exemplified almost the identical language,[13] as did the Massachusetts Bay Charter.[14]

The colonists were making a positive effort to both preserve their English heritage while at the same time commencing their history as independent Americans. Thomas Jefferson, in a letter to Skelton Jones of July 28, 1809, said

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10. J. Goebel, "King's Law and Local Custom in Seventeenth Century New England," in Flaherty, Ed., *Essays in the History of Early American Law* (Univ. of North Carolina Press, Chapel Hill, 1969), p. 83.

11. Chaffee, "Colonial Courts and the Common Law" in Flaherty, Ed., *supra,* at 56.

12. *Ibid.,* at 57.

13. *Documents of American History,* Ed. by Henry Steele Commager (Appleton-Century-Crofts, N.Y., 1949), p. 7.

14. *Ibid.,* p. 18.

of the Virginia Constitutional Convention's work, that "we concluded not to meddle with the common law (by codification), i.e., the law preceding the existence of the statutes, further than to accommodate it to our new principles and circumstances. . . ." Indeed, Jefferson seemed convinced of the need of colonial law to incorporate the common law and privileges of England. In his letter to Judge John Tyler of June 17, 1812, this attitude seemed clear:

> "I deride with you the ordinary doctrine, that we brought with us from England, the common law rights . . . . On our arrival here, the question would at once arise, by what law we govern ourselves? The resolution seems to have been, by that system which we are familiar, to be altered by ourselves occasionally, and adapted to our new situation. The proofs of this resolution are to be found in the forum of the oaths of the Judges, 1 Hening's Stat. 169, 187; of the Governor, *ibid.*, 504; in the act for a provisional government, ibid., p. 372; in the preamble of the laws of 1661-2; the uniform current of opinions and decisions, and in the several records of all of our statutes framed on that basis . . ."[15]

So it seems clear that the colonists attempted to incorporate the English common law as a basis for their own. Yet, they reserved for themselves the room to adapt and alter the common law of England insofar as it would help suit their changed conditions in the new world. But as the cases both preceding and subsequent to the American Revolution will demonstrate, the right against self-incrimination, as it applied in a proceeding involving the threat of

15. The *Writings of Thomas Jefferson*, Ed. Andrew A. Lipscomb (Thomas Jefferson Memorial Association of the United States, Washington, D.C. 1904), Vol. XIII, p. 7. Quote from letter to Skelton Jones, *Ibid*, Vol. XII, p. 299.

a penalty, fine, or forfeiture, was an English common law right which the colonists would not wish to diminish, but rather would seek to strengthen and preserve, against not only encroachments by the English Crown, but when necessary against their own lawfully constituted government.

History amply demonstrates that the right against self-incrimination was a part of the common law of England that the colonies accepted. Moreover, it seems clear that this right was adopted and evolved in the context of proceedings involving monetary fines and forfeitures. Indeed, much of the basis of the American Revolution itself was centered on the imposition of fines and forfeitures by the English Crown on commercial enterprises of the American colonists. Similarly, that the founding fathers gave great impetus to the protection of property rights when framing the Constitution is beyond historical dispute.[16]

2. American colonies extended protection against self-incrimination to actions for fines, penalties, and forfeitures.

One of the first instances recorded involving the right against self-incrimination in America occurred in New York and involved the very tensions inherent between the Crown and its subjects that were litigated in the English common law, and exists today in the case at bar. Specifically, the invocation of the right was in opposition to a statute imposing a fine on one found illicitly trading. Since enforcement of previous acts such as the one in question in that case had proven unsuccessful, the legislature had adopted an amendment in 1722 that required all

16. See the *Federalist Papers* No. 10 (Madison); No. 15 (Hamilton); No. 25 (Hamilton); No. 54 (Madison); No. 70 (Hamilton); No. 84 (Hamilton); No. 85 (Hamilton).

those suspected of violating the act to give an oath that they had not done so.[17] If the subject refused, he was automatically convicted of illicitly trading and *fined* 100 pounds.

The colonists' opposition to the statute became focused on the self-incrimination provision and found expression in their objections directed to the Board of Trade. John Sharp, the London agent for several colonists, argued that the statute was illegal because the suspect "was by a very extraordinary oath, made liable either to accuse himself or to suffer great *penalties.*" (Emphasis added).[18] When other colonists gave evidence in front of the Board of Trade in regards to the proposed amendment, they similarly expressed their belief that it illegally required them to incriminate themselves. In discussing the act with a fur trader, John Peloquin, the Board of Trade asked him if he had ever purchased skins from the French, to which he replied:

> ". . . answering that question might give ill consequences to himself, if it were since the passing of the said acts; and since he believ'd their Lordships could not expect Mr. Peloquin should accuse himself."[19]

The Lordships changed the subject immediately, and subsequently recommended that Governor Burnett be urged to halt the illegal trade in another manner. The Board of Trade then pointed out the fatal flaw in the proposed amendment;

17. Leonard Levy, *Origins of the Fifth Amendment,* (Oxford Univ. Press, N.Y. 1968), p. 381.
18. *Ibid.*
19. *Ibid.*

> "There is an oath impos'd upon all traders whereby they are obliged to accuse themselves or else be under the greatest temptation to perjury."[20]

When New York finally enacted their new statute regulating the fur trade, the objectional provision was noticeably omitted.

In Massachusetts in 1754, the right again drew significant attention and recognition. That year the legislature enacted a new liquor excise tax, requiring purchasers to report to tax collectors, on oath if necessary, the amount of money they expended on liquor that year. Opposition to such a bill was formidable and widespread due to its incriminating oath. John Lovell, a Boston schoolmaster who had once taught John Hancock and Samuel Adams, described the bill as "the most pernicious Attack upon English Liberty that was ever attempted" and would if allowed enslave the country.[21]

Samuel Cooper, minister of the Brattle Church was even more precise in his attack on the oath. If one had to account as to his innocent conduct in this manner, which he felt was extortion, "every other Part may with equal Reason be required, and a Political Inquisition severe as that in Catholic Countries may inspect and countroul every Step of his private Conduct."[22] He continued:

> "But will anyone presume to say, that this will be no Diminution of our Liberties, if it be in a central part of our Constitution, that no Man is held to convict himself in any Affair where he is accus'd. And whoever will undertake to prove, that a Man can consistent with the Constitution, be obligid to clear

20. *Ibid.*
21. *Ibid.*, p. 386.
22. *Ibid.*

himself of an innocent Action by Oath, or *forfeit an heavily Penalty,* may a fortiori prove, that this practice is defendable in Criminal Cases."[23]

Such opposition bore fruit, as Governor William Shirley refused to sign the bill on the basis that it was an unprecedented violation of "natural rights".[24]

The privilege against self-incrimination repeatedly arose in connection with writs of assistance and their use in proceedings for penalties and forfeitures against colonial shippers. The writ allowed customs officials to search ships for goods allegedly shipped into colonial ports in violation of revenue acts or other acts regulating colonial trade. On the basis of evidence found, the Government could then instigate suits for *penalties and forfeitures* in the courts of Vice Admiralty. Such courts were governed by civil law rather than the common law tradition. Trials were held in secret, without the need of grand jury indictment and without the aid of common law principles. One of the common law protections most conspicuously lacking and which the Americans particularly deplored was the absence of the privilege against self-incrimination.

Henry Laurens, a South Carolina planter-merchant, was an unwilling participant in this system. In particular, he levelled his criticisms against the admiralty judge's abridgment of the right against self-incrimination. The injustice of Laurens' situation became well-known and furthered colonial opposition to procedures which subjected colonists to fines and forfeitures without the right against self-incrimination. Laurens himself quoted Lord Bacon against the practice, "whereby Men are inforced to accuse themselves . . . (when punishment or) 'grievous Inconveniences' " might be the consequence of confessing the truth. Specifically, the "grievous" consequence in question was an imposition of a fine and a penalty.[25]

23. *Ibid.*
24. *Ibid.*

When John Hancock fell victim to the same procedural injustice in Boston in 1768, popular opinion reached a groundswell in opposition to such practices. Boston's *A Journal of the Times,* in condemning the fine and forfeiture of citizens' property without the protection of the right against self-incrimination, condemned such practices as "Star Chamber Proceedings" using the "Inquistorial" tactics of examining citizens secretly and by "odious" interrogatories, in the hope that evidence could be "fished up" to sustain the prosecution. The *Journal* noted, in making reference to both the Laurens and Hancock cases, whether the Court might not next "put parties or witnesses to the torture and extend them on the rack."[26] Yet despite such public outcry against such self-incriminatory practices, the Philadelphia Customs Office in 1770 sought to question by oath every officer and seaman suspected of smuggling tea into the port. But Attorney General Andrew Allen, correctly sensing the colonial dedication to the principle of no self-incrimination, informed the collector of the port:

> "I am very clear in opinion that the Court of Admiralty cannot with propriety oblige any persons to answer interrogatories which may have a tendency to criminate themselves or subject them to a *penalty,* it being contrary to any principle of Reason and the Laws of England." (Emphasis ours)[27]

Indeed, at least seven of the early State Constitutions and Declarations of Rights contained provisions against

25. *Ibid.*, p. 398.
26. *Ibid.*, p. 399.
27. *Ibid.*, p. 399.

self-incrimination. Moreover, the wording of many of them was extremely broad, not being limited to criminal prosecutions at all. For example, the Delaware Declaration of Rights of 1776 provided:

> "Section 15: 'That no man in the Courts of Common Law ought to be compelled to give evidence against himself'."[28]

Such provision was distinguished from other more traditional criminal guarantees such as the right to counsel, a speedy trial, confrontation, and so on, which were located in separate provisions of the Declaration of Rights (Section 14). By framing the self-incrimination clause broadly, the drafters of such constitutions intended to make clear that the privilege applied in cases such as penalties and forfeitures, regardless of their designation as criminal or civil. Maryland's Declaration of Rights took a similar approach:

> XX. "That no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court . . . ."[29]

As with Delaware, this provision was separated from those other traditionally criminal guarantees included in the Constitution, the latter being enumerated in Section XIX.

When James Madison first introduced the self-incrimination clause to Congress, he proposed the broad principle that, "no person . . . shall be compelled to be a witness against himself."[30] His wording, as with the State Constitutions previously noted, was intended to secure and in-

28. *The Bill of Rights, A Documentary History,* Bernard Schwartz, (Chelsea House, N.Y., 1971), Vol. I, p. 278.

29. *Ibid.*, p. 282.

30. Levy, *Origin of Fifth,* p. 423.

corporate into the Constitution the full scope of the common law right against self-incrimination.[31] Although many of the self-incrimination cases involving fines and forfeitures were designated as criminal already, Madison's draft went even a step further in securing this right, regardless of how the fine or forfeiture was classified, or regardless of the nature of the proceeding in which it arose.

Madison's wording was objected to by John Laurance, a Federalist lawyer from New York. Laurance felt that the provisions should be designated as referring to "criminal cases" only. His reasoning was that to do otherwise would make the amendment "in some degree contrary to laws passed."[32] What historians believe Laurance was referring to was Section 15 of the Judiciary Act of 1789. That Section, in the original draft, empowered the federal courts to compel civil parties to produce books and papers containing real evidence. It also allowed a party in a civil case to be examined under oath. In other words, Section 15 merely was one of the first discovery provisions in federal legal history. Apparently Laurance felt that the way Madison had framed the self-incrimination clause would jeopardize these discovery provisions of the Judiciary Act. Remarkably, Laurance's suggested change was accepted by Madison and the Committee of the Whole, and in the entire House with little debate. In light of the tremendous opposition to the use of self-incriminatory methods in cases involving forfeitures and penalties, as we have seen, and the role of this grievance in the American Revolution in general, one can only conclude that the framers felt that even by leaving the wording "criminal" in the self-incrimination clause, that the protection

31. *Ibid.*, p. 423.

32. *Ibid.*, p. 424.

would still extend to fines and forfeitures, regardless of their characterization by the legislature.

3. Post ratification proceedings treat actions to collect fines, forfeitures and penalties as "criminal cases" for purposes of the privilege against self-incrimination.

The entire case precedent subsequent to the ratification of the American Constitution also supports such a rationale. In *Taney v. Kemp,* 4 Harris and Johnson 348 (Md. 1818), the Court decided whether a witness was bound to answer the question touching on an issue which would subject him to criminal prosecution *or a penalty.* Though ruling that civil liability in itself was not necessarily a ground for not answering, the Court was unequivocal that being subject to a criminal prosecution *or a penalty* was

> "It is well established, that a witness shall not be obliged to answer questions which may subject him to *criminal prosecution; or to a penalty, or to a forfeiture.*" (Emphasis ours) At 350

Similarly, in *Johnson v. Goss,* 10 Tenn. (2 Yerg) 110 (1825), the Supreme Court of Tennessee ruled that a witness could not be compelled to answer in such circumstances. Johnson sued Goss for seducing his daughter, and when the daughter was cross-examined as to her chastity, an objection was taken. The Supreme Court upheld that objection on the basis that:

> "The law is, that 'a witness shall not be compelled to answer any question which subjects him to *penalties* or punishment, *or to a criminal* charge.'" (Emphasis ours) At 110

In *People v. Rector,* 19 Wend. 569 (N.Y. 1838), the Supreme Court of New York also decided whether the

self-incrimination clause protected a witness from answering a question that would subject him to a penalty. They answered that it would:

> "The authorities to this are well summed up in Roscoe's Cr. Ev. Phila. ed. of 1836, pp. 133, 4, 5; but need not be here examined. I will only observe that the practice of compelling the answer where there is *no penalty* seems to be gaining ground by the modern cases . . . . But he excused the witness because the offense was more than a mere moral one; it would subject her to a *penalty.*" (Emphasis added) At 581-582

In *Lister v. Boker,* 6 Blackf. 439 (Ind. 1843), the Indiana Supreme Court again specifically ruled on whether the self-incrimination protection applied to cases involving penalties and forfeitures. This case involved an assumpsit by Boker against Lister, based upon a promissory note. At the trial, Wood, the assignee of Lister, was called as a witness for the Defendant and asked what consideration he had given for the promissory note. The Court then interrupted and informed Wood that if the consideration given was small bills, issued by himself for the purpose of being used as circulating medium, he could be subjecting himself to penalties and forfeitures by answering. An Indiana Act of 1840 prohibited the circulation and issuing of small bills made by individuals or corporations for the purpose of passing as circulating medium. As punishment, the statute had provided for each offense a forfeiture of the bills and a penalty of double the amount of each bill so issued, to be recovered in an action on *debt.* Indeed, such an action was not a criminal prosecution per se. Yet the Court ruled that the witness was not bound to answer such an inquiry because:

"A witness is not bound to answer any question, if his answer will expose him to *criminal punishment, or a penal liability.* 1 Stark. Ev. 191- Dandridge v. Corden, 3 Carr and Payne 11 - (other cases cited)." (Emphasis added) At 440-41

Also instructive on this point is the Virginia Supreme Court case of *Poindexter v. Davis,* 6 Grat. 481 (Va. 1850). The Plaintiff Davis sued in detinue for the recovery of a slave sold by Steven Terry. Terry had purchased but a life estate in the slave from Davis, yet had sold it to Poindexter, the latter believing he purchased an absolute interest in the slave. At trial, the Plaintiff had prepared interrogatories calling on the Defendant to say whether or not he had purchased the slave from Terry. The Defendant answered them, and the Plaintiffs offered such evidence at trial, but the Defendant objected to their answers on the grounds that the Plaintiffs were seeking to enforce a *forfeiture.* The trial court overruled their objection, but on appeal the Defendant prevailed. The Court, in ruling that the Defendant was not bound to answer, demonstrated the strength of the American prohibition against self-incrimination in cases involving penalties and forfeitures:

"In the last respect, indeed, it conforms to the spirit of the common law which, jealous of the liberty of the citizen, protects him from being made his own accuser, or forced to give evidence against himself." At 490

Or, as the Appellant's brief put it, quoting Story's Equ. Pl. §579:

". . . it is well settled that a defendant will not be required to answer a bill of discovery, where his answer will subject him to a *penalty or forfeiture.* . . ." At 486

In another case involving a fine, yet not specifically classified as criminal, the Supreme Court of Georgia ruled that the self-incrimination guarantee indeed came into play. In *Bryan v. State,* 40 Ga. 688 (Ga. 1870), two defendants were required to appear before the Superior Court and show cause why they should not be fined for neglect of their duties as County Commissioners. The Defendants contended that the proceeding was criminal and they were not bound to testify against themselves. They were overruled by the trial court and fined $50.00. But on appeal, the court reversed, saying:

"It has been from time immemorial a settled principle of the common law, that no one shall be compelled to answer any question as a witness, tending to criminate himself *or* subject him to a *fine* or *forfeiture, or* any criminal charge: 1 Greenleaf Ev., pp. 620-21. Our evidence act . . . The words used are: 'No person shall be compelled to answer any questions tending to *criminate* himself or herself.' "

"It is true that this is not exactly a criminal case, yet, it closely analogizes itself to such cases. . . ." (Emphasis added) At 689

The Virginia case of *Langhorne v. Commonwealth,* 76 Va. 1912 (Va. 1882), also clearly illustrates the point. That case involved an indictment against William Henry Terry Langhorne for the burning of a tobacco factory. In attempting to discredit a witness on the basis that he had procured the execution of a deed based upon a false pretense, the Court ruled that the witness was not bound to answer such an inquiry. The Court said, in quoting 2 Taylor Ev. §1453:

" 'Where the answers would have a tendency to expose the witness, or, as it seems, the husband or wife

of the witness, to any kind of criminal charge, whether in the common law or ecclesiastical courts, or to a *penalty or forfeiture* of any nature whatsoever, the witness is not compellable to answer. This rule, which is of great antiquity (he says), applies equally to parties and to witnesses, and is now uniformly recognized by all British tribunals, whether civil or criminal. No party can be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure, however material the answer may be to his adversary's case . . . . This doctrine prevails in the spiritual courts and is part and parcel of the law of Scotland.' And it is the law of America. Greenleaf says: 'The authorities are exceedingly clear that the witness is not bound to answer.' 1 Green L. Ev. § 451." (Emphasis theirs) At 1021

> "Numerous authorities might be cited which clearly establish that if the fact to which the witness is interrogated forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or misdemeanor, *or expose him to a penalty or forfeiture,* he is not bound to answer . . . ." (Emphasis ours) At 1022

In the case of *Masseth v. Johnson,* (C.C.) 59 Fed. 613 (1894), the Court adhered to the common law rule herein discussed. That case involved a bill in equity for the accounting for an alleged infringement of a patent. The vendor of the device alleged to be infringing the patent, who was not a party to the suit, was compelled to testify to the purchase and use of the patented item by the defendant. The Court held that he could be so compelled without violating the Constitutional provision that no witness should be compelled to testify against himself in a

criminal case. The basis of such ruling was that the statute in question did *not* subject the infringer to *penalties* or *forfeitures* but only authorized the Court to impose civil damages for such actions. They said:

> "It is contended that Palm cannot be compelled to give evidence on behalf of complainant, because thereby he may subject himself to *penalties and forfeitures* hereafter in accounting with the present complainant . . . . (W)e do not regard Rev. Sp. §§4919, 4921, as subjecting him hereafter to *penalties* and *forfeitures* . . . . (t)hey simply empower the court, in its discretion, and 'according to the circumstances of the case', to impose additional damages against the infringer . . . . The calling of Palm to testify was a violation neither in letter nor spirit of the constitutional provision (see Amendment 5) that 'no person . . . shall be compelled in any criminal case to be a witness against himself.' " At 614-15

Perhaps Henry Campbell Black's treatise on *Constitutional Law* (St. Paul, Minnesota: West Publishing Co., p. 574) in 1897 put it best when he said:

> "The guarantee (the self-incrimination clause) does not create any new right, but merely reaffirms a common law privilege. It is directed against the extraction of confessions . . . and against the inquisitorial method of trial. The seizure or compulsory production of a man's private books or papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and in a prosecution for a crime, *penalty,* or *forfeiture,* is *equally* within the constitutional prohibition." At 574

4. In *Boyd v. United States* and subsequent cases this court held that a civil action to collect fines, penalties, or forfeitures was a "criminal case" for purposes of the Fifth Amendment self-incrimination clause.

In *Boyd,* a forfeiture proceeding under the customs revenue laws, the United States claimed that Boyd and Sons, a partnership, had fraudulently evaded paying taxes on thirty-five cartons of imported plate glass. The statutory penalty for fraudulent non-payment of the tariff was forfeiture of the goods involved. Accordingly, the Government seized the glass and instituted forfeiture proceedings against it. During this proceeding, the Government obtained a court order directing that Boyd and Sons produce an invoice that allegedly contained proof that they had in fact violated the tax statute.

The statute pursuant to which the order was issued proved that failure to comply with the order would be treated as a confession of the allegations set forth in the Government's petition. The Boyds complied under protest, arguing that both the order and the statute authorizing it were unconstitutional and in derogation of the Fifth Amendment guarantees against self-incrimination. This Court unanimously agreed with this contention. Because of the penalty for non-compliance, the Court held that the statute violated the Fifth Amendment right against self-incrimination:

> "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . . .
>
> "As therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law,

> are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . ." At 634-635

In reaching this conclusion the Court examined in detail the English common law experience with self-incrimination and post Civil War congressional enactments providing for the protection of the privilege against self-incrimination in suits to collect penalties and forfeitures, though civil in form. The Court paid especially close attention to the actions of the First Congress in proposing the self-incrimination clause in what became the Fifth Amendment;

> "The views of the first Congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the Judiciary Act of 1789. The fifteenth section of that Act . . . as originally enacted is as follows:
>
> > 'All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in the possession or power, which contain evidence pertinent to the issues, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order (to produce books) it shall be lawful . . . to give judgment for the defendant . . . .'" At 630-631

The Court found from adoption of this section an intent by the Congress to give the widest possible application of the protection against self-incrimination, stating,

> "Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime or forfeit his property . . . ." At 631

The Court concluded that even though the statute in question in Boyd and the form of the action to collect the penalty was expressly not designated criminal by Congress, still, for purposes of the Fifth Amendment self-incrimination clause, they were in fact quasi-criminal and Boyd and Sons could not be compelled to incriminate themselves in an action to collect a forfeiture. At 634-35

Seven years later in *Lees v. United States,* 150 U.S. 474 (1893) this Court expressly reaffirmed without dissent the doctrine of *Boyd* insofar as it relates to the self-incrimination cluase in actions to collect fines or penalties. In *Lees,* the United States sought through a civil action to collect a forfeiture (in realty, a penalty) of $1,000.00 for a civil violation of an act prohibiting the importation of aliens under contract to perform certain labor in the United States (23 Stat. at 332). At the trial, Lees was called as a witness by the Government. He objected to testifying on the grounds of the privilege against self-incrimination. His objection was overruled. This Court held:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case the defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than refer to the case of Boyd v. United States (citation omitted) . . . ." At 430

In *Hepner v. United States,* 213 U.S. 103 (1909) a monetary penalty imposed for violation of the immigration laws was deemed a civil action in which the rules of civil procedure applied generally and the Government was held to be entitled to a directed verdict. Hepner had complained that the action was in reality a criminal prosecution, citing *Boyd* and *Lees,* and arguing that, as such, the Government was not entitled to receive a directed verdict in a criminal case. Mr. Justice Harlan, speaking for the Court, with only one dissent, addressed this issue:

> "This view cannot be sustained. That case was a civil action to recover a penalty for importing an alien into the United States. . . . In that case (Lees) the trial court compelled one of the defendants to testify for the United States and furnish evidence against himself. This Court held that that could not be done; saying that 'this, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself,' meaning thereby the use of depositions. . . . In the latter case (Boyd) it was adjudged that penalties and forfeitures incurred by the commission of offenses against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings . . . of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.
>
> "So that the Lees and Boyd cases do not modify or disturb but recognize, the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against him-

self in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." At 111-112

In *United States v. Regan,* 232 U.S. 37 (1914), *Boyd* was again reaffirmed without dissent. A $1,000.00 penalty had been imposed for violation of the immigration laws. Regan argued that the action against him, though civil in form, was in reality criminal and that the Government must prove its case beyond a reasonable doubt, the standard of proof in a criminal prosecution. This Court disagreed, but distinguished an evidentiary rule from the constitutional protection against self-incrimination.

Mr. Justice VanDevanter, dismissed the Regan contention that *Boyd* and *Lees* governed his case. The right was distinguishable, and *Boyd* and *Lees* were

". . . without present application, for they deal with guaranty in the Fifth Amendment to the Constitution against compulsory self incrimination, which as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions, and is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions (omitting citations)." At 50

In *Helvering v. Mitchell,* 303 U.S. 391 (1938) the issue was whether an acquittal on a criminal indictment for tax evasion was a bar to a "civil" action by the government to collect a fifty (50) percent "civil fraud" penalty. The Court held that the Fifth Amendment double jeopardy clause did not prevent the assessment or collection of the penalty, for the penalty was regulatory, tax raising, not punitive. Mr. Justice Brandeis, speaking for the Court, distinguished, however, the self-incrimination clause of the same amendment. We believe this analysis and reasoning

makes explicit what the earlier intervening cases since *Boyd* made only implicit:

"The distinctions here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, cases have usually attempted to distinguish between the type of procedural rule involved than the kind of sanction being enforced (citations omitted)." At 400, fn.3

He then distinguished the cases permitting a directed verdict in actions to collect civil penalties and the holdings that the Government need not prove its case in such actions beyond a reasonable doubt with those situations where a claim of the protection against self-incrimination occurred in the same actions. He expressly cited *Boyd* and *Lees* and the language from *Regan,* ". . . the guaranty in the Fifth Amendment to the Constitution against compulsory incrimination . . . is of broader scope than are the guaranties in Article III, and the Sixth Amendment governing trials in criminal prosecutions." 232 U.S. 50 at 400, fn.3

In *United States v. United States Coin and Currency,* 401 U.S. 715 (1971) the *Boyd* doctrine was reaffirmed. This Court ruled that the privilege against self-incrimination could properly be invoked in forfeiture proceedings involving money which the Government had seized from a person's possession at the time of his arrest for violation of federal gambling registration and tax statutes. In language that is very applicable to the present statutory scheme, this Court, speaking through Mr. Justice Harlan, declared it had no doubts that Congress possessed the power to authorize collection of taxes on unlawful gambling activities.

"It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question." At 717

Similarly, here there can be no question of the power of Congress to prevent oil spills and discharges, but it is the method Congress has chosen that raises the Fifth Amendment question.

In *One Lot*, as here, ". . . the Government urges that the present forfeiture should not be considered the result of a 'criminal' proceeding for the Fifth Amendment purposes." At 719. Invoking the doctrine of *Boyd* and its progeny, the Court held the forfeiture proceedings to be a "criminal case" within the meaning of the Fifth Amendment self-incrimination clause. In holding that the forfeiture proceeding was invalid, this Court was essentially stating only that the civil penalty could not be imposed in a manner inconsistent with the Fifth Amendment right against self-incrimination.

Ward asserts, based on the analysis of decisions since *Boyd*, that the penalty imposed upon him here is "quasi-criminal" and therefore invokes certain fundamental constitutional guarantees normally accorded criminal defendants, even though such a penalty does not invoke the full panoply of individual rights which a criminal penalty would trigger.

One such fundamental right invoked by a quasi-criminal penalty is the privilege against compelled self-incrimination.

The common law tradition which afforded a broad and liberal application of the self-incrimination privilege is equally a part of our constitutional heritage. The Fifth Amendment self-incrimination privilege has been afforded a liberal construction. See, e.g., *Miranda v. Arizona*, 384

U.S. 436 (1966); *Ullmann v. United States*, 350 U.S. 422 (1956); *Hoffman v. United States*, 341 U.S. 479 (1951); *Helvering v. Mitchell*, 303 U.S. 391, 400 n. 3 (1938); *Boyd v. United States*, 116 U.S. 616 (1886); *Lees v. United States*, 150 U.S. 476 (1893); *United States v. United States Coin and Currency*, 401 U.S. 715 (1971); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

The *Boyd* case is the root of a doctrine reaffirmed as recently as 1971 in *United States v. United States Coin and Currency, supra*, which acknowledges that even where purely civil penalties are involved, some of the constitutional protections afforded criminal defendants are applicable.

Certainly an oil spill, prohibited by 33 U.S.C. §1326 (b) (3), is an "offense against the law" by the very words used in 33 U.S.C. §1326 (b) (6):

". . . operator of any . . . facility . . . from which oil . . . is discharged *in violation of paragraph (3)* . . . shall be assessed a civil *penalty* . . . for each offense * * *" (Emphasis added)

Such language seems to clearly indicate a "penalty . . . incurred by the commission of (an offense) against the law" in the words of *Boyd*.

The Government in its Brief (p. 49) argues that *Boyd*, *Lees*, and *Coin and Currency* "do not stand for the proposition that monetary penalties that are plainly civil in character should nevertheless be regarded as criminal in order to further the 'policies' of the Fifth Amendment." It is difficult to reconcile that statement with the plain language of the cases themselves, or Mr. Justice Brandeis' opinion in *Helvering, supra*, at 400 fn.3. Indeed the Government's attempted distinction has been rejected both by the Tenth Circuit, *Bramble v. Richardson*, 498 F.2d 968

(1974), and legal scholars who have studied the problem at some length: See, Charney, Johathan I., "The Need for Constitutional Protections for Defendants in Civil Penalty Cases," 59 Corn. L. Rev. 478, 503, 515 (1974); Clark, J. Morris, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis", 60 Min. L. Rev. 379, 392, et seq.; Comment, "Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases, 55 Boston University Law Review 112, 131 (1975)"; Note, "The Concept of Punitive Legislation and the Sixth Amendment," 32 U. Chi. L. Rev. 290, 291 (1965).

Assuming, however, the Government is correct in its analysis of the issue, its application to the statutory scheme here fails. The Government claims that *Boyd* reached its result because "The Government filed an information for forfeiture of certain goods, but did not file a criminal charge . . . . (T)he Court premised its holding on the specific finding that the forfeiture of goods was one of the 'penalties affixed to the criminal acts' prohibited by the statute" (p. 50). Leaving aside for the moment that this statement utterly fails to take into consideration the four (4) paragraphs immediately preceding the statement quoted (*Boyd*, 632-4), the same test applied here would make 311(b)(6) a criminal penalty. Ward submits that from the relevant constitutional standpoint, there is no difference between an oil operator who pays a $250.00 civil fine and an oil operator who pays a $250.00 criminal fine, either of which could be imposed for the same course of conduct. A discharge of oil into the navigable waters of the United States was, and still is, punishable as a criminal offense pursuant to the Rivers and Harbors Appropriation Act of 1899 (1899 Refuse Act), 33 U.S.C. §411. See *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974), where the Refuse Act criminal penalty was imposed for an

oil seepage, and in which the Court specifically held that the Government was not required to prove common law *mens rea;* to the same effect, see *United States v. Interlake Steel Corp.*, 297 F.Supp. 912 (D.C. Ill. 1969), a criminal prosecution under the 1899 Refuse Act for a discharge of iron particles and an oily substance; see also *United States v. U.S. Steel Corp.*, 328 F.Supp. 354 (D.C. Ind. 1970). It is clear from the foregoing cases that a discharge of oil into navigable waters may subject one to a criminal penalty under the 1899 Refuse Act, even without any showing of intent, or *scienter,* or common law *mens rea.*

In fact, prior to the enactment of the Water Quality Improvement Act of 1970, the only remedy against Ward for this particular oil spill would have been a criminal penalty under the 1899 Refuse Act. A comparison of the prohibitory clauses of the 1899 Refuse Act and the Federal Water Pollution Control Act Amendments of 1972 reveals little difference. The 1899 Refuse Act, as codified at 33 U.S.C.A. § 407, provides inter alia:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever [other than sewage] . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . ."

From the Federal Water Pollution Control Act Amendments of 1972, as codified at 33 U.S.C.A. §§1321(b)(3) and (6):

> "(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States

. . . in harmful quantities as determined by the President . . . is prohibited. . . ."

* * *

"(6) Any owner or operator of any vessel, on-shore facility or off-shore facility from which oil . . . is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty. . . ."

* * *

Clearly, the only essential difference between these two provisions is the nature of the penalty prescribed. The course of conduct is identical, and the language of the prohibition, while not in *haec verba* is so essentially the same in meaning as to be indistinguishable; the only difference is that the Refuse Act specifically provides that if the oil spiller is charged under its provisions, and pays a fine, it will be a criminal fine, whereas if the oil spiller is charged under the provisions of the Federal Water Pollution Control Act Amendment of 1972, the Congress can compel an oil spiller to report himself and be fined "civilly" and thus effectively free the Government from the restraints imposed by honoring the Fifth Amendment guarantee against self-incrimination afforded to citizens.

Thus, when the Government claims (p. 52) that "in the cases upon which Respondent (Ward) relied in the Court of Appeals, the monetary penalty or forfeiture was dependent on the occurrence of an integrally related criminal offense, and was, in actuality, but a form of punishment for the commission of that offense," it has described precisely and exactly the situation here because the same act that gave rise to the "civil penalty" also could have been used to prosecute a criminal action, without further evidence of intent. Ward could have been prosecuted criminally or proceeded against civilly and the same is true

for Boyd and Sons, John Lees,[33] and Donald J. Angelini (*Coin and Currency*), who in fact was prosecuted by indictment. *Coin and Currency, supra,* at 716.

When the Government claims that Section 311(b)(3) "contains no criminal sanctions" (p. 53), it is neglecting to point out that 311(b)(3) is the companion sanction to the Refuse Act. Contrary to the Government's argument, this statutory scheme is clearly dissimilar from the holding in *Helvering* where, the Government claims (p. 53), the Court "there observed that where the monetary penalty or forfeiture is remedial, the defendant does not have the protection of a number of procedural rights normally associated with the criminal process, including the Fifth Amendment privilege against self-incrimination." However, *Helvering* did not discuss whether this would be true when there was a compelled self-incrimination under a threat of a criminal fine and imprisonment if the disclosure was not made, and a penalty up to $5,000.00 (now $50,000.00 and in some instances $250,000.00) if disclosure was made, without regard to fault, and there was an identical criminal provision. Obviously such a penalty would no longer be truly "remedial" or "regulatory" as *Helvering* intended.

The Government's Brief at pages 51-53 cites *United States v. Regan,* 232 U.S. 37 (1914); *Hepner v. United States,* 213 U.S. 103 (1909); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 as standing for the proposition that there must be a "direct nexus to an underlying criminal offense." (Brief in Chief, page 53). The Government also relies upon dicta in *Helvering v. Mitchell, supra,* that neither the holding of *Boyd* nor that in *Lees* would

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33. This same refutation applies to the Government's efforts to distinguish *Lees* at p. 51 in its brief, for the same conduct there could have been a criminal or civil offense. Indeed, the statute referred to the act as an "offense" as does 311(b)(6).

necessitate the invocation of certain procedural rights associated with the criminal process where the sanction involved is remedial, rather than punitive.

The essential difficulty with the dicta in *Helvering v. Mitchell, supra,* is that it does not comport with the decisions of this court. *Boyd* was a limited decision, limited to protection and assertion of the Fifth Amendment self-incrimination privilege and the rights guaranteed by the Fourth Amendment. No other criminal procedural rights were invoked in *Boyd;* nor have they been subsequently in civil penalty proceedings. However, the Fifth Amendment self-incrimination privilege and the freedom from unreasonable searches and seizures have, since *Boyd,* consistently been held to be invoked in civil penalty proceedings in the decisions of this Court. *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1975).

This Court has consistently upheld the self-incrimination privilege and the search and seizure provisions in civil penalty cases, and consistently denied the protections of other individual rights in such proceedings.

The Fifth Amendment self-incrimination provision was upheld in *Boyd v. United States, supra; Lees v. United States, supra; United States v. United States Coin and Currency, supra* and the Fourth Amendment protection against unreasonable search and seizure was upheld in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965). On the other hand, the Court denied recognition for the assertion of double jeopardy in *One Lot Emerald Cut Stones v. United States, supra;* in *Helvering v. Mitchell, supra;* in *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943); and in *Rex Trailer Co. v. United States,* 350 U.S. 148 (1956); in *United States v. Regan,* 232 U.S. 37 (1914), the Court held that the government was not required to prove its case beyond a reasonable doubt in a civil penalty

proceeding, and in *Hepner v. United States,* 213 U.S. 103 (1909) the Court approved a directed verdict in a civil penalty case.

Lees involved a monetary fine; *Coin and Currency* involved forfeiture of money; *Plymouth Sedan* involved the forfeiture of an automobile, and in each of those cases the Fourth, and Fifth Amendment rights recognized in *Boyd* were held to be invoked for the protection of the individual. *One Lot* involved the forfeiture of precious gem stones and *Helvering v. Mitchell, supra,* involved the payment of a statutory money penalty, but the double jeopardy provision was held not to be invoked in either case.

The nature of the penalty in the five cases is the same —forfeiture of property or money,[34] or the payment of a fine or a penalty—the only distinction among the cases being in the nature of the right asserted. The self-incrimination privilege and the search and seizure right identified in *Boyd* were held invoked; the double jeopardy protection was held not to be invoked by the nature of the penalty involved.

Ward contends that the history of the Fifth Amendment privilege against "self-accusation" as it developed under the English common law in response to the inquisitorial method, and as incorporated in our American common law and legal heritage, and as it found its way into our Constitution, and as it has been interpreted in the case law of the colonies, the state, and the decisions of this Court as recently as 1972, underscores the vitality of and the broad and liberal application to be given to the self-incrimination privilege.

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34. A forfeiture is not limited to tangible property but is also a monetary penalty. 47 U.S.C. 14, and 503.

It should be stressed that Ward is not here arguing the widsom or folly of the administratively imposed civil penalty scheme for oil spills, or for any other particular proscribed behavior. Nor is Ward asking that the self-reporting provisions be struck down; nor would enforcement of the Act or the collection of the penalty be defeated by upholding the judgment of the circuit court. It would still be permissible to assess the penalty based on a discharge of oil under the Act, providing that the evidence used to establish the discharge is derived from a source wholly independent of the compelled disclosure required by 311(b)(5). See *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972); *United States v. Maplewood Poultry Co.*, 327 F.Supp. 686 (D.C. Me. 1971). Moreover, this "use" immunity would be extended only when the owner-operator had given "immediate" notification. *United States v. Ashland Oil and Transp. Co.*, 364 F.Supp. 349, 350 (D.C. Ky. 1973).

Ward is well aware of the justifications put forward in support of administratively imposed civil penalties, such as expediency, the desire to avoid the stigma of a criminal record for often unintentional behavior, and the purported effectiveness of economic deterrence. Ward does not doubt that in many cases the imposition of civil penalties is much more expedient than the prosecution of a criminal case by the Government. But Ward does urge that when the Constitution is sacrificed to expediency, the Courts must act on behalf of the Constitution. *Barker v. Wingo*, 407 U.S. 514 (1972).

In sum, Ward urges that the penalty sought to be imposed here falls clearly within that class of penalties which may be called "quasi-criminal" and which entitle an individual to basic, important, fundamental individual rights guaranteed by the United States Constitution; that

among the most fundamental and basic of all of these rights is the privilege against self-incrimination guaranteed by the Fifth Amendment.

In *Helvering*, this Court undertook to analyze the sanction involved there to determine whether it was remedial (civil) or punitive (criminal). We believe our analysis under Proposition II, *infra*, and the Government's Brief in Chief—not to mention that the three judges of the Court of Appeals, applying the same criteria as the District Court, found diametrically different results—prove that we all recognize: that the test of statutory analysis to determine whether the penalty is one of remedial or punitive purpose is an elusive one and Congressional intent is often ambiguous.[35] Like beauty, the determination is in the eye of the beholder. Indeed, Mr. Justice Frankfurter spoke of "dialectical subtleties" in distinguishing criminal from civil penalties. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (separate opinion). It is for this reason that we believe the history of the self-incrimination clause is instructive. For hundreds of years, through the English, Colonial, and American experiences, actions to collect penalties or forfeitures have historically been denominated "criminal" or "quasi-criminal" or of such a nature that the protection against self-incrimination has been extended. We ask that the Court reaffirm that historical doctrine today, for it has as much validity in this statutory scheme as it did at the time of the passage of the hated Navigation Acts.

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35. Indeed other courts found Congressional intent under 311(b)(6) ambiguous. *United States v. General Motors Corp.*, 403 F.Supp. 1151, 1158 (D.C. Conn. 1975) and two courts expressed the need for much closer scrutiny of the compelled reporting requirement had the defendant been a non-corporate entity. *United States v. Allied Towing, supra*, 578 F.2d at 980; *United States v. LeBeouf Bros. Towing Co., supra*, 537 F.2d 151-152.

PROPOSITION II:

THE FACTORS ENUNCIATED IN *KENNEDY v. MENDOZA-MARTINEZ* ARE NOT CONTROLLING IN THIS CASE, BECAUSE (1) THE FACTORS WERE NOT DEVELOPED, LISTED ONLY AS DICTUM, (2) THEY WERE NOT RELIED UPON IN THE CASE WHERE THEY WERE DEVELOPED, (3) EMPLOYING THE FACTORS LEADS TO AMBIGUOUS RESULTS. HOWEVER, IF UTILIZED HERE, THEY SUPPORT THE DECISION OF THE COURT BELOW.

The Government's first argument is that Section 311 is designed to be remedial rather than punitive, and hence does not trigger the protections of the Fifth Amendment to the United States Constitution. Yet, a reading of history will demonstrate that the resolution of such an issue as this requires more than bald assertions and familiar labels.

The Government alleges that the Court of Appeals below admitted that the provision in question was remedial in that it helped defray the costs for clean-up of oil spills for which the Government's clean-up costs were not otherwise recoverable. What the Government failed to point out is the additional language of the Court of Appeals immediately subsequent to the language they rely upon.

> "The fact that the civil penalty assessed pursuant to subpart b(6) forms a part of this 'revolving fund' indicates its remedial nature. See (cases cited).
>
> "*However, the statutory language dealing with the automatic assessment and determination of the amount of the penalty indicates a punitive intent.* . . . (T)he factors used in determining the amount of the penalty are not, in our view, reasonably related to the purposes of the revolving fund. Rather, the factors are based upon a retributive and punitive motivation.

> "The civil penalty cannot be characterized as compensatory. . . ." 598 F.2d 1187, at 1191.

Thus, it is clear that the Court below felt that the provisions of the Act in question were of a punitive nature. Indeed, they acknowledged that portions of the statute had as a purpose a remedial aim, but nowhere did they admit that such partial remedial purpose overcomes nor even equals the primary punitive quality of the statute as a whole. The Government admits as much in its Brief. In quoting Senate Report No. 91-351, at page 16, it acknowledges that the penalty in question was also expected to have an impact in *deterring* discharges. At page 18, its deterrent impact is again admitted:

> "The civil penalty was expected to discourage the discharges for which clean-up costs were not likely to be recovered. . . . (T)he civil penalty helps to *prevent harmful spills 'by making care more economical than carelessness.'* " (Emphasis added)

The Government also quotes language from several cases in support of the proposition that the statute in question is remedial and not punitive. For example, *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978) is cited for the proposition that the statute is remedial. *Tex-Tow, supra,* goes much further. While holding that the statute contains evidence of a remedial purpose, the Court also indicated that it was clear it had a more punitive and deterrent purpose as well.

> "There is also evidence of a remedial purpose to clean up spills once they occur rather than *solely a deterrent purpose*. . . ." (Emphasis added) At 1315

The Government also relies upon *United States v. Marathon Pipeline Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978), to support the remedial rationale of the statute. But the

Court in *Marathon, supra,* again said more than the Government indicates. In particular, it held that, "deterrence is not the *sole* purpose . . ." of the penalty. At 1309 Similarly, in *United States v. General Motors Corp.,* 403 F.Supp. 1151, 1162 (D.C. Conn. 1975), the opinion of the Court evidenced a belief that the statute had a dualistic purpose, both remedial and punitive.

> "The civil penalty provision, when effectively enforced, no doubt *deters* oil discharges. . . ." (Emphasis added) At 1162

Also, in *United States v. Atlantic Richfield Co.,* 429 F.Supp. 830, 841 (E.D. Pa. 1977), aff'd sub nom. *United States v. Gulf Oil Corp.,* 573 F.2d 1303 (3rd Cir. 1978), the Court demonstrated that it felt the statute had more than simply a remedial purpose.

> ". . . it (Congress) has chosen to use economic means - the (b)(6) penalty in order to *deter* spills. . . ." (Emphasis added) At 841

The entire collection of cases that the Government cites in support of the remedial nature of the statute are similarly subject to the same ambiguity. In *United States v. W. B. Enterprises,* 378 F.Supp. 420, 422-23 (S.D. N.Y. 1974), the Court although characterizing the penalty in question as a civil one also said:

> "It appears, therefore, that this section is aimed at *preventing* any discharge, rather than preventing only those discharges not removed." (Emphasis added) At 422

Such rationale, then, supports not simply a remedial statute which would be aimed at preventing discharges that would not be removed. But the Court goes further, directing its provisions at preventing any discharge,

"rather than preventing only those discharges not removed." That type of intent is certainly one that has traditionally been regarded as punitive.

United States v. Eureka Pipeline Co., 401 F.Supp. 934 (N.D. Va. 1975) relied upon by the Government, also can support the punitive as well as remedial nature of the statute. The Court quite frankly admitted the deterrent function of the statute:

> "Language from the Senate Committee which considered the amendments of 1972 indicates that *deterrence was to be one of the results of the penalty* imposed by paragraph (6). The Committee wrote, 'The Committee believes that the discharge of such substances should be subject to a penalty *even though clean up is not practicable.* In this way, each carrier or handler evaluates the *risk* of discharge and determines whether or not potential penalty is worth the risk.' " (Emphasis added) At 939

It seems clear from these cases, as well as the legislative history, that the statute has both remedial and punitive-deterrent characteristics and functions. The Court below recognized this. While recognizing that the statute had some remedial goals, it noted that the manner in which these goals were accomplished indicated more of a punitive criminal intent. For instance, factors that specifically may not be considered in fixing the amount of the penalty, by logic should be, if the statute is remedial. For example, the responsible party's removal effort and expense are not to be considered in fixing the penalty.[36] It seems clear that if the statute's intent is indeed remedial,

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36. The Commandant's Instructions specifically provide that "clean-up" efforts should not be a factor in assessing the penalty. A 40. The Government took the same position in the District Court below. A 36.

an effort by the responsible party to remove the spillage and to expend funds of his own in removing the spillage would enhance the remedial purpose. By contrast, the factors that may be considered in fixing the penalty indicate clearly a criminal intent of the statute in question. Such factors include the degree of culpability associated with the violation, and the amount of oil discharged. By focusing upon the wrongfulness of the act and the prior record of the party, the policy of the act seems focused on the individual liable, rather than upon the act he is responsible for. As the Court below said:

> "This language is lacking in any 'remedial' ring. The costs of investigation are not considered in assessing the amount of the penalty. Similarly, the factors involved in determining the amount of the penalty are not in any way related to what damage may have occurred to the environment by reason of the discharge. See: *United States v. W. B. Enterprises, Inc.*, 378 F. Supp. 420, 422-23 (S.D. N.Y. 1974)." At 1192

Thus, it is clear that not only the statute's provisions on its face reflect both punitive and remedial aspects, the regulations and policies underlying the enforcement of the statute are also open to such contradictory interpretations. It seems clear, then, that a reading of the face of the statute is inconclusive. Moreover, as the cases cited by the Government illustrate, and as the quoted provisions of the legislative history indicate, whether or not the statute is remedial or punitive is not clear. Most likely, it has both remedial and criminal attributes. What is obvious is that the statute cannot simply be characterized one way or the other merely on the basis of its face, or its label. *Trop v. Dulles,* 356 U.S. 86, 94-95.

Since the statute does not clearly on its face indicate whether it is remedial or punitive, the Government urges

resort might be had to the *Mendoza-Martinez* test. Yet, that test has shortcomings in itself. For one, the test was not a majority opinion of this Court, but only a plurality one. Thus, the listing of the factors was dictum. Also, the resolution of *Mendoza-Martinez* itself was not based upon the factors cited in that opinion, but upon an examination into the intent of Congress.

> "We hold §§401(j) and 349(a)(10) invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving and remaining outside the country. . . ." At 165

> "Here, although we are convinced that application of these criteria to the face of the statute (*Mendoza-Martinez* quoted criteria) supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of Congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." At 169

Thus, the Court in *Mendoza-Martinez* based its decision on Congressional intent. As we have seen in this case, however, a firm indication of Congressional intent is absent. In such a case, one might look to the *Mendoza-Martinez* factors for guidance, even though it was only a plurality opinion.

It should further be noted that the list did not pretend to be conclusive, nor exclusive. Indeed, one commentator has suggested certain other tests which were and have been applied by this Court in the past in determining whether a statute was penal or regulatory. [Note, 37 Tulane Law Review 831, 833 (1963)].

A further limitation upon applying the seven factors identified in *Mendoza-Martinez* is that the Fifth Amendment self-incrimination privilege has historically been found to demand a more liberal interpretation than other individual rights guarantees contained in the Bill of Rights. *Helvering, supra,* at 400, n.3.

Another limitation on the *Mendoza-Martinez* test is the inconclusive nature of the indicators enumerated by the Court. Several courts applying the indicators to the 1321(b)(6) oil spill penalty provision have come to opposite conclusions based upon application of the same factors. The instant case is, of course, a good example. In *Ward v. Coleman,* 423 F.Supp. 1352 (W.D. Okla. 1976) the District Court, after applying the *Mendoza-Martinez* indicators, concluded that the penalty was civil. The Court of Appeals, applying the same factors, found the penalty to be criminal. *Ward v. Coleman,* 598 F.2d 1187 (1979). In the Fifth Circuit, the District Court found the penalty criminal, while the Fifth Circuit found it to be civil, relying upon *Mendoza-Martinez. United States v. LeBeouf Brothers Towing Co.,* 377 F.Supp. 558 (E.D. La. 1974), rev'd, 537 F.2d 149 (5th Cir. 1976).

Nevertheless, given these limitations, and with the premise that the *Mendoza-Martinez* factors are not conclusive, they are useful in analyzing the various attributes of a particular sanction with a view to determining the more significant effects of the sanction in question.

1. Whether the sanction involves an affirmative disability or restraint.

Despite the Government's contention otherwise, a monetary penalty has also been considered as an affirmative disability. See *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n.,* 518 F.2d 990, 1001 (1975) aff'd on other

grounds, 430 U.S. 442. Moreover, in *United States v. Futura, Inc.,* 339 F.Supp. 162, 165 (D.C. Fla. 1972), the Court made a similar holding:

> "The sanction which can be imposed does involve an affirmative disability or restraint. The monetary penalty, here a $5,000.00 fine, has traditionally been regarded as a form of criminal punishment."

Indeed, at the time of the oil spill involved in the case at bar, 33 U.S.C. §1321(b)(6) provided for a fine of up to $5,000.00 for each offense. While it is conceded that a monetary penalty may be either a civil or a criminal sanction, i.e., either punitive or regulatory, that fact does not resolve the question so easily. To be sure, the penalty of denationalization has been held to be both punitive and regulatory in nature. Denationalization was found punitive in *Mendoza-Martinez* and in *Trop v. Dulles, supra,* 356 U.S. 86, yet not in *Perez v. Brownell,* 356 U.S. 44 (1958). While a monetary penalty is generally not as great a disability or restraint as prison or expatriation, a potential fine of $5,000.00 at the time of the spill, and, as amended, $50,000.00 or $250,000.00 would certainly be seen as an affirmative disability by almost all upon whom such a fine fell.

Indeed, the Court below correctly recognized that monetary penalties can and do involve the type of affirmative disability or restraint necessary to constitute a criminal penalty:

> "Nevertheless, the imposition of monetary penalties does 'inflict a pocket-book deterrence or restraint on the recipient.'" (*Atlas* cited) At 1193

Yet, even the Court below found little definitive use for criterion 1 of the *Mendoza-Martinez* test in the case

at bar, illustrating the problem with the *Mendoza-Martinez* test in general.

> "Thus, because a sanction is used equally for non-punitive and punitive purposes, it offers little indication as to Congress' intent. Monetary penalties have traditionally been applied to *both criminal and civil statutes.*" (Emphasis added) At 1193

2. Whether the sanction has historically been regarded as punishment.

Despite the Government's assertion that this factor "clearly supports the remedial, non-criminal nature of the civil penalty provision," as we have seen, both the American and English legal experience point to a long history of the existence of the right against self-incrimination in proceedings involving fines, penalties, and forfeitures—regardless of their characterization. Indeed, as was pointed out previously, it was the colonial experience with arbitrary and self-incriminatory commercial laws levelling fines, penalties, and forfeitures that helped lay the foundations for the establishment of the right against self-incrimination in America.

Moreover, this principle has received continued historical support through the 19th and into the 20th century, as our brief previously pointed out. In *United States v. Futura, Inc., supra,* the Court held that a monetary penalty "has traditionally been regarded as a form of criminal punishment." This Court held in *United States v. LaFranka,* 282 U.S. 568, 573 (1931):

> "Admitting that the penalty may be recovered in a civil action, as well as by criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment,

> and its character is not changed by the mode in which it is inflicted, whether by civil action or a criminal prosecution."

In fact, the criminal provision of the 1899 Refuse Act, 33 U.S.C. §411 provides for monetary fines as well as, or as an alternative to, imprisonment for the very same acts for which Ward was punished in this case. Such provision bears out the problems inherent in trying to rigidly adhere to the *Mendoza-Martinez* analysis. As the Court below said:

> "(W)hether it (the sanction) has historically been regarded as punishment. This indicator also gives little indication as to Congress' intent. *Monetary penalties have traditionally been applied to both criminal and civil statutes.*" (Emphasis added) At 1193

Though monetary penalties in general have been historically applied in both criminal and civil statutes, it seems clear that the fine involved here is the type of historic fine, forfeiture, or penalty to which the self-incrimination clause has applied. Thus, history in no way supports the Government's attempt to apply the *Mendoza-Martinez* rationale in its favor, even if that test were always the proper guide. To the contrary, in regards to this particular type of fine, history illustrates exactly the opposite.

3. Whether the sanction comes into play on a finding of scienter.

The Government asserts in its brief that "there is no *scienter* requirement for the imposition of a civil penalty under" 311(b)(6). (Brief in Chief, p. 38) While the terms of the statute mandate assessment of a penalty for each offense, regardless of any finding of *scienter* in the common

law sense, there is an element of *scienter* involved in assessing the fine in accordance with the statutory mandate in consideration of "the gravity of the violation." [33 U.S.C. §1321(b)(6)]. It is clear that the Coast Guard, in interpreting the phrase "gravity of the violation," has used that term to include a consideration of whether or not the discharge was intentional, or the result of gross negligence, and of the degree of culpability of the violator. [Commandant Instruction No. 5922.11A, A 38-40.]

The Government asserts in its Brief that it is irrelevant that the criminal sanctions in the Rivers and Harbors Appropriations Act of 1899 do not contain a *scienter* requirement. Though Ward would agree that it would not be relevant that some unrelated criminal statute did not contain a *scienter* requirement; we do not believe it can be said to be irrelevant that the criminal sanction in the Rivers and Harbors Act, applicable to the identical behavior as involved in the instant case, does not involve *scienter*.

This statute is objectionable precisely because it purports to establish a civil penalty applicable to the identical behavior which is already punishable by a criminal penalty; it compels notification of the behavior to the Government, and automatically imposes the penalty based upon the individual's compelled notification; this Act effectively imposes the same sort of monetary penalty as the criminal monetary penalty provided by the Rivers and Harbors Act at 33 U.S.C. §411, without the necessity and inconvenience of affording procedural safeguards. By the magic of changing labels, the Congress has removed the protection of the Fifth Amendment's Self-Incrimination Clause.

4. Whether the sanction's operation will promote the traditional aims of punishment-retribution and deterrence.

The Government argues that though admittedly the provision in question is deterring, it is of the type of "regulatory deterrence" making it non-criminal.

> ". . ., as noted above . . . Congress expected §311(b)(6) to serve some deterrent function, especially where the oil could not be readily removed." (Government's Brief, p. 41)

The Government, then, contends that the deterrent effect contemplated in *Mendoza-Martinez* must be "more than that which would predictably follow from the assessment of a penalty for a remedial purpose."

Yet it seems clear here that the manner in which the Act was written precludes a reading of it as having a "remedial purpose." To have a remedial purpose, it would be necessary for the Act to stress the repair or the remedying of the damage done to the environment. Yet the Act in question specifically precludes the consideration of "(1) the responsible party's *removal effort or expense*. . . ." A 40

Indeed, the manner in which the penalties are assessed supports the proposition that a fine could be assessed "far in excess of that reasonably related to the remedial purposes . . ." and under the Government's analysis making an "*in terrorem* effect akin to that of being adjudged guilty of a criminal offense." Specifically, the statute provides:

> "In determining the amount of the penalty or the amount agreed upon in compromise, the appropriateness of such penalty to the *size* of the business of the owner or operator charged, the effect on the owner

or operator's ability to continue in the business, and the gravity of the violation shall be considered." 311 (b) (6)

Further, the Commandant's Instructions interpreting and implementing 1321 (b) (6) direct an accounting of the "gravity of the violation, the degree of culpability, and the prior record of the party. . . ." A 39-40

Moreover, Senate Report 91-351, page 3, on the Water Quality Improvement Act, regarding the predecessor of the Act in question, discussed this bill's penalty provision:

> "Frequently, the offenders have made no attempt to clean up the spill and have gone *unpunished.* This bill attempts to correct these deficiencies."

These considerations simply are not relative to any remedial purpose. Moreover, a fine assessed according to the size of the offender, his ability to stay in business, his culpability, and to "punish" him, could easily result in a fine completely out of proportion with the remedial purpose, whether or not the fine is too high or inadequate. Or, in the words of the Court below:

> "In our view, this factor lends considerable weight to a finding that the civil penalty is actually criminal in nature. The statute and the administrative policies adopted pursuant thereto have the effect of *retribution. The penalties are based upon such factors as the gravity of the violation, the degree of culpability, and the prior record of the party.*
>
> "Thus, we conclude that the retributitive aspects of the civil penalty provision weighs heavily in favor of finding the statute penal in nature." At 1193

5. Whether the behavior to which it applies is already a crime.

The Government, in analyzing this factor, downplays the undisputed fact that the Act Ward was convicted under was clearly already a crime. *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974). It argued that such a fact has "little bearing on Congress' intent" in the present case simply because the statute at bar is not triggered upon the finding that a "crime" has been committed, and that that crime is expressly incorporated into the statute.

Such an argument is clearly but another exercise in semantics. Nowhere in any of the cases cited, including *Mendoza-Martinez,* does this Court allude to the necessity of a "nexus" being present within the Government's definition of such. In all of the cases cited by the Government, the issue was simply one of determining the intent of Congress as to whether Congress intended the act in question to be a crime or not. In those cases, the penalty was designated by Congress as a non-criminal sanction, or a tax. In *Lipke v. Lederer,* 259 U.S. 557, 562 (1922); *United States v. LaFranka,* 282 U.S. 568, 572-3 (1931); *United States v. Constantine,* 296 U.S. 287 (1935); the sanction in question was designated as a tax and premised upon the commission of a criminal act. Yet, the Court did not say that a sanction had to be so premised in order to in truth be a crime. The fact that it was in those cases, of course, lent support to the finding by the Court that the tax Congress levied was intended to be a criminal penalty. But no such "nexus" was ever held to be necessary. Cf. *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265 (1888).

The finding of a "nexus" has no rational relationship to the intent of the test. Whether or not the prior act making Ward's actions here a crime was passed in 1976 or 1776 is irrelevant to the purpose of this component of the

test. In fact, the longer an act has been designated as criminal would seem to lend support to the finding that penalties based upon similar acts are also crimes. As the Court below put it:

> "Whether the behavior to which it applies is already a 'crime.' This factor falls clearly in favor of a finding that the statute is criminal in nature.
>
> "It is therefore clear, that the behavior to which the civil penalty applies is already a crime." At 1193

6. Whether an alternative purpose other than punishment may rationally be ascribed to the sanction.

As previously seen, alternative purposes can arguably be ascribed to the sanction. Indeed, much has been said of the remedial nature of the statute. Yet, the crucial problem with this analysis is that alternative purposes other than punishment may not *rationally* be ascribed to the sanction. That this is true is primarily because the factors involved in determining the penalty have no relationship to any remedial purpose. Although fines assessed for oil spills are paid into a revolving fund, which is utilized according to the statute for clean-up costs where the origin of the spill is undertermined, or for reimbursement to the operator who can establish in the Court of Claims that the oil discharge at issue was caused by an act of God, war, negligence by the United States, or an act or omission of a third party [33 U.S.C. §1321(k), (i), (1), (c) and (d), the amount of the penalty bears no relationship to the cost to the United States in *remedying* the spill.

Although the Government stresses the remedial aspect of paying the penalty monies into the revolving fund under 311(k), it would appear that the actual remedial impact

comes from the provisions providing that a spiller of oil must pay for his own clean-up. Indeed, an operator of an onshore facility who cannot prove the defense of an act of God, war, negligence of the United States, or an act or omission of a third party, is liable for the actual cost of clean-up in an amount not to exceed Fifty Million Dollars, or in an unlimited amount where the discharge is a result of willful negligence or willful misconduct. [33 U.S.C. 1321 (f)(2)]. Thus, the remedial aspect of the act is found in the potential liability for clean-up costs rather than the penalty provision. Indeed, the potential liability for such clean-up costs far exceeds the limitation on the penalty provision.

Moreover, as we have seen, the factors used in determining the amount of the fine are not relevant to any regulatory purpose. Indeed, it is not even permissible to take into account the responsible party's removal effort or expense. (A. p. 40) If indeed the penalty was intended to be remedial, such a factor would be considered. If the goal of the act was to remedy the oil spill, the party's effort in cleaning up his own spill should be highly relevant to determining his fine. Moreover, other factors which may be considered in assessing the fine are equally irrelevant to a regulatory remedial purpose. Such factors as the degree of culpability, the prior record of the responsible party, and the amount of oil discharged clearly are the kind of factors traditionally used in assessing criminal punishment. Also, a consideration of such factors as the size of the business of the owner or operator, the effect on the owner or operator's ability to continue in the business, and the gravity of the violation clearly do not raitonally relate to any regulatory remedial purpose. Rather, they are of the type of consideration traditionally employed in gauging a fine or a punishment in a criminal proceeding. Or, as the Court below said:

"In addition to these factors, the Government urges the penalty can be regarded as compensation to the United States for tortious damage to the environment (cases quoted). We agree that the penalty could be regarded as such compensation, if the factors involved in determining the amount thereof reasonably related to the extent of the damage to the environment. However, as previously noted, the factors are not addressed to this issue. Therefore, we decline to employ the Government's rationale." At 1194

7. Whether the sanction appears excessive in relation to the alternative purpose assigned.

The Government seems to assert that because the penalty in this case was $250.00, the statute does not provide for penalties grossly disproportionate so as to smack of punishment. Moreover, they contend that in the majority of cases even the maximum penalty of $5,000.00 could not be considered excessive. Yet, such is not the case.

As the Court below said:

"Imposition of penalties even in situations where the discharge is accidental, non-negligent and non-intentional, could be excessive. This is especially so, when the operator, in good faith, attempts to clean up, and, in fact, does clean up the discharge on his own initiative. Inasmuch as the amount of the penalty is correlated to the size of the business involved, a large business concern may very well be heavily penalized despite a lack of fault. Any subsequent clean-up operations and attempted removal by the operator would not mitigate this penalty. (Instructions cited). In such a situation, the imposition of a large penalty would be excessive. Thus, we conclude that this indicator leans in favor of the penal nature of the act." At 1194

To be sure, the consideration of this factor must be somewhat speculative. Since the amount of the penalty at the time of the spill ranged from $1.00 to $5,000.00 (and currently from $1.00 to $250,000.00), a literal application of the test to the facts of each case could very well result in a different finding depending upon the size of the fine.

However, an examination of the statutory directive, and of the Coast Guard's interpretation thereof, would seem to indicate a punitive intent. Consideration of "appropriateness of such penalty to the size of the business of the owner or operator charged. . ." would seem to indicate an intent to assess a penalty not in absolute terms based upon the size of the spill, which would be related to a regulatory remedial purpose, but rather on subjective terms, based upon the size of the operator. The intent appears to make the fine large enough to be felt.

There simply is not a reasonable or rational alternative purpose assignable to the penalty. The penalty attaches where the operator is without fault, and where the operator makes a good faith clean-up. Under the statutory directive, a small business and a large business "guilty" of the identical spill, and of the identical clean-up effort, would presumably be fined different amounts, each appropriate to the size of the business. In both cases, the environmental harm which the Government urges would be identical; yet the fine assessed would be tailored to the size of the business in order to assure that the large business paid a fine proportionately large enough to be felt. Thus, it is clear that there is no rational relationship between this fine and the harm to the environment sought to be remedied. Rather, the fine is directed at the individual operator in question and is determined on the basis

of those factors traditionally used in determining criminal punishments and penalties.

The rigorous application of a little wheatfield common sense to the statutory scheme involved here clearly exposes the fundamentally punitive and constitutionally deficient nature of the 1321(b)(6) oil spill penalty.

The Government vigorously contends that the penalty provision is, in fact, regulatory. What the Government fails to account for is the essentially unregulable nature of the activity which invokes the fine. It is not the business of engaging in the handling of oil which invokes the fine—it is the spilling of oil. It is not just the careless spilling of oil, or the negligent spilling of oil, or intentional spilling of oil, which invokes the fine; it is any spill of oil, regardless of fault; in fact, the operator incurs the fine even if he could prove that the oil spill was caused by the acts of third parties which he had done his utmost to prevent. See *United States v. General Motors Corp.*, 403 F.Supp. 1151 (D.C. Conn. 1975), in which General Motors was fined after vandals opened a spigot on a tank, allowing oil to reach navigable waters. The District Court noted that General Motors had taken every reasonable precaution to prevent the exact sort of act which, in fact, caused the spill.

The Government compares Ward's instant case with the situation in *Helvering v. Mitchell*, 303 U.S. 391, where this Court found a 50 percent penalty for failure to pay income tax was a remedial penalty and did not invoke the double jeopardy clause protection after Mitchell had been acquitted on criminal charges of evading income tax. Aside from the fact that the Self-Incrimination Clause was not at issue in *Helvering v. Mitchell, supra*, the behavior there involved was behavior in which Mitchell had

a choice. The fine was imposed for failure to pay income tax due, a shortcoming which Mitchell could have remedied by paying the tax. Mitchell thus had a choice of regulating his behavior to conform to the requirements of the statute, or not, and chose not.

As the trial transcript reveals, Ward here essentially had no choice with regard to the oil spill. The cause of the spill was never determined; it happened and Ward was fined.

The combination of attributes which characterize the oil spill penalty scheme renders clear the constitutional deficiency in this particular statutory penalty.

First and foremost is the fact that the report compelled by 1321(b)(5) under threat of criminal sanction for failure to report is the trigger upon which imposition of the penalty is made by the Coast Guard.

Secondly, the automatic nature of the fine insures that the proscribed act will invoke the fine, regardless of fault. There is, it seems to Ward, something inherently repugnant in a scheme which not only imposes an automatic fine upon absolutely blameless activity, but further compels the victim of the penalty to furnish a detailed report of his misfortune so that he may be appropriately fined. It is akin to requiring a homeowner whose house burns to the ground to file a report with the appropriate clean air agency, under threat of criminal prosecution for failure to do so, so that he may be appropriately fined for polluting the atmosphere with smoke. And, of course, in the case of oil spill, the operator has the additional liability to third parties for any damages caused, together with clean-up liability, together with his direct monetary loss resulting from the spill.

The third determinative element of the statute is its obvious punitive intent. As previously discussed, the Congressional Committee Report indicated a desire to punish oil spillers; the statute itself contains language directing consideration of the size of the business in setting the fine, presumably with a view to insuring that the penalty be appropriately large enough to be felt, although there is further statutory direction to apparently protect the ability of the operator to continue in business.

The fourth distinguishing characteristic of the statutory scheme which compels the conclusion that it is punitive and criminal is the fact that the remedial purposes which the monetary penalty could presumably satisfy are elsewhere provided for in the statute. Other provisions provide for direct liability for clean-up costs, for direct liability to third parties damaged by any oil spills. Since this penalty statute is in addition to the other remedial purposes, it would appear that its only logicial purpose is to punish the oil spiller.

CONCLUSION

The Government has claimed that unless the decision of the Court of Appeals is reversed, the enforcement of the Act and the purpose, therefore, to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" are threatened. We believe this to be an exaggerated claim of statutory impotence. At most, given the facts stated in the Petition for Certiorari (pp. 12-13), the number of operators who are non-corporate and therefore able to claim the protection against self-incrimination will have a relatively insignificant impact upon the Act. The impact, however, upon the Fifth Amendment will be something else; there will be a stunted right against self-incrimination. Already the suggestion has received

favorable consideration that more administrative "civil" penalties" should be assessed.[37] The argument made here by the Government to override the protection of the Fifth Amendment is perhaps superficially persuasive, given the concerns with oil pollution and chemical discharges. Measured against such natural concerns (which Ward shares) the temptation to loosen slightly the protection against self-incrimination is inviting. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure . . .," *Boyd*, at 641. "This Court has been zealous to safeguard the values that underlie the privilege (against self-incrimination)" *Kastigar v. United States*, 406 U.S. 441, 445 (citing *Boyd*).

There are important values in upholding in this instance the protection against self-incrimination that is coerced by a threat of criminal prosecution for failure to report. The privilege against self-incrimination

> ". . . reflects many of our fundamental values and most noble aspirations . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a 'fair state-individual balance by requiring . . . the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human

37. The Administrative Conference of the United States has approved the recommendation to broaden the use of administrative civil penalties and at the same time has deplored any additional rule-making procedural safeguards. See 41 U.S. Law Week 2326, and Administrative Conference of the United States, Professor Harvey J. Goldschmid, "An Evaluation of the Present and Potential Uses of Civil Money Penalties as a Sanction by Federal Administrative Agencies." November 1, 1972.

> personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self deprecatory statements . . . ." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964)

In light of these policies, imposition of a "civil penalty" against those who give notice of a spill contravenes the privilege against self-incrimination. Requiring a spiller to give the Government the evidence it needs to impose liability serves to eliminate the Government's obligation to carry "the entire load." Indeed, forced notice suggests an "inquisitorial" rather than an "accusatorial" system. Furthermore, such notice appears to invade the "private enclave" by requiring disclosure of activities the Government is attempting to regulate. In view of the established judicial policy of construing the amendment's protections broadly, *Grosso v. United States*, 390 U.S. 62 (1968), the decision of the Court of Appeals should be affirmed. Reversal of that judgment can be supported only by artificial refinements and technicalities which find no support in the self-incrimination clause of the Fifth Amendment. We ask the Court's continued fidelity to the history, meaning, and purpose of the privilege and protection against compelled self-incrimination.

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FOR ARGUMENT

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No. 79-394

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent, invoking the Fifth Amendment privilege against compulsory self-incrimination, argues that he could not be compelled to be a witness against himself in the instant proceedings to assess and recover a "civil penalty" under Section 311(b)(6) of the Federal Water Pollution Control Act. So saying, he must of course overcome the plain language of the Fifth Amendment, providing that "No person * * * shall be compelled *in any criminal case* to be a wit-

ness against himself, * * *" (emphasis added). In an effort to demonstrate that the Fifth Amendment does not mean what it says, respondent has advanced an elaborate historical argument, presented for the first time in this Court, which he suggests shows that suits by the government to recover forfeitures and penalties—apparently *all* forfeitures and penalties—are within the sweep of the privilege. We address that new contention here.

1. a. The most conspicuous defect in respondent's argument based on English and Colonial materials is that all of these predate consideration and ratification of the Fifth Amendment. The Self-Incrimination Clause of that Amendment was, as respondent acknowledges (Resp. Br. 24-26), deliberately limited in its application to "criminal cases." When James Madison first proposed amendments to the Constitution, the privilege was stated in broad terms: "no person * * * shall be compelled to be a witness against himself." 1 Annals of Congress 434 (June 8, 1789). Conceivably, this language would have been broad enough to permit a defendant in a civil penalty proceeding (or, indeed, in any civil case) to decline to testify, although it is unlikely the provision was intended to have this reach.[1] But, however that may

[1] The corresponding provision in the Virginia Declaration of Human Rights, though written in similarly broad terms, was contained in Section 8 of the Declaration, which otherwise dealt with rights obtaining in criminal cases. L. Levy, *Origins of the Fifth Amendment* 405-407 (1968); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 787 (1935). The Virginia Declaration of Human Rights has long been recognized as a model for the Bill of Rights. Levy, *supra*, at 409. Respondent's reliance (Resp. Br. 24) on comparably broad language in the Declarations of Rights of Maryland and Delaware (the *only* two state provisions in which the right was not included in a section dealing expressly with rights obtaining in criminal cases, Levy, *supra*, at 423), is therefore misplaced. Moreover, respondent cites no authority, and we have found none, for his bald assertion that the drafters of the Maryland and Delaware Declarations intended "to make clear that the privilege applied in cases such as penalties and forfeitures, regardless of their designation as criminal or civil" (Resp. Br. 24). We would have no quarrel with this statement, of course, if respondent meant only that a defendant or a witness in a civil penalty or forfeiture action or other civil case could have asserted a privilege if his testimony would reasonably expose him to prosecution for a criminal offense. The Fifth Amendment itself protects testimony in civil cases to this extent. See, *e.g.*, *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924).

be, when the special committee appointed to consider Madison's proposed amendments recommended that the same language be used in describing the privilege, Rep. Lawrence of New York stated that he "thought it ought to be confined to criminal cases, and moved an amendment for that purpose; which amendment being adopted, the clause as amended was unanimously agreed to * * *."[2] 1 Annals of Congress 753

[2] As respondent points out (Resp. Br. 25), several commentators have suggested that the Fifth Amendment privilege was confined to "criminal cases" in order to avoid any possibility of conflict with Section 15 of the Judiciary Act of 1789, ch. 20, 1 Stat. 82, which provided for courts of the United States to order discovery where consistent with then-

(Aug. 17, 1789). Thus, it is clear that Congress deliberately limited the scope of the clause to "criminal cases."

b. In any event, the historical materials relied upon by respondent do not support his position. The English precedent cited by respondent (Resp. Br. 12-16) is largely irrelevant. It is now well established that the Fifth Amendment privilege was adopted in response to inquisitorial procedures of the Star Chamber and ecclesiastical courts, "which placed a premium on compelling subjects of the investigation to admit guilt from their own lips." *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). See also *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956); *Brown* v. *Walker*, 161 U.S. 591, 596 (1896); L. Levy, *Origins of the Fifth Amendment* (1968) (hereinafter Levy); 8 J. Wigmore, *Evidence* § 2250 (McNaughton rev. 1961) (hereinafter Wigmore).

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prevailing rules of chancery concerning bills of discovery. See Levy, note 1, *supra*, at 425-426; Note, *Applicability of Privilege Against Self-Incrimination to Legislative Investigations*, 49 Colum. L. Rev. 87, 90-94 (1949). This suggestion is based on the statement by Rep. Lawrence, in proposing the limitation, that the language originally offered by Madison and reported by the Committee "contained a general declaration, in some degree contrary to laws passed." 1 Annals of Congress 753 (Aug. 17, 1789). The Judiciary Act had been approved by the Senate prior to the House's consideration of the Bill of Rights, although it had not actually "passed" the House or the Congress at that time.

In contrast, the English cases upon which respondent relies, with one exception,[3] all involved bills in equity in which a party to a private action at law sought to compel discovery of evidence pertaining to the lawsuit. In each, the court declined to compel discovery on the ground that the individual from whom the evidence was sought could have been required to admit facts that would have exposed him to a forfeiture or penalty. But except where the response would have clearly implicated the defendant in the commission of a crime (see *East India Co.* v. *Campbell*, 1 Vesey Sr. 245 (1749); Resp. Br. 16), these cases do not involve a privilege analogous to that of the accused in a criminal proceeding; they were instead based on the traditional maxim that equity will not aid a forfeiture. 8 Wigmore, *supra*, at § 2256; cf. Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 11 (1949). They therefore shed no light on the present question.

For example, the plaintiff in *Smith* v. *Read*, 1 Atkyn 526 (1736), and *Harrison* v. *Southcote*, 1 Atkyn 527 (1751) (see Resp. Br. 13-14), contested the defendant's title to land on the ground that the defendant had acquired land by purchase or devise

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[3] The one exception cited by respondent, *The Trial of Sir Jonathan Freind*, XIII State Trials 1 (1696), recognized the right of a witness in a prosecution for high treason to refuse to answer whether he was a Catholic or a Protestant. But in the passage quoted by respondent (Resp. Br. 13), it appears that the answer may have implicated the witness in a crime. Thus, this case is fully consistent with the accepted scope of the Fifth Amendment privilege.

from a person who had purchased it from plaintiff's ancestor in violation of an Act of Parliament prohibiting Catholics from acquiring land. The plaintiff in each case had brought a bill in equity to discover whether the person through whom defendant claimed was a "papist" at the time of purchase. The court held that the defendant was not bound to answer because "he [would be required] to discover a disability in himself; and there is no difference between a forfeiture of a thing vested, and a disability to take, inflicted as a penalty * * *." *Smith* v. *Read*, *supra*, 1 Atkyn at 527; see also *Harrison* v. *Southcote*, *supra*, 1 Atkyn at 538-539. The Fifth Amendment would not stand as a comparable barrier to discovery or testimony in a civil suit merely because it might expose a defect in a party's or witness's title to property.[4]

Likewise, in *Boteler* v. *Allington*, 3 Atkyn 453 (1746) (Resp. Br. 15), the defendant resisted discovery because to answer might have revealed that he was in violation of a law prohibiting a member of the clergy from accepting a second ecclesiastical living. The penalty for accepting a second living was to "forfeit" the first living, and the court held that the defendant could not be compelled to give responses that might result in such a forfeiture. *Id.* at 456. The opinion appears to rely on little more than the fact that adverse consequences would result if the

[4] It is also clear that one person cannot assert the Fifth Amendment privilege of another. *Fisher* v. *United States*, 425 U.S. 391, 396-401 (1976).

individual responded—a privilege far beyond that embodied in the Fifth Amendment.

The English cases involving bills in equity to compel discovery therefore have little relevance to the proper construction of the constitutional privilege, which, as noted above, sprang from quite different origins in reaction to proceedings in the Star Chamber and ecclesiastical courts.

c. The American Colonial history relied upon by respondent (Resp. Br. 19-26) is no more helpful to his cause. Respondent first discusses (*id.* at 19-20) the public opposition in New York to a requirement that all persons suspected of violating a law prohibiting fur trading between Albany and Quebec take an oath that they had not engaged in such trading. Refusal to take the oath automatically convicted the individual of the *crime* of illicit trading and subjected him to a fine of $100. Levy, *supra*, at 381. This episode therefore has no bearing on the application of the privilege in cases involving a noncriminal monetary penalty.

Respondent also errs in relying (Resp. Br. 21-22) on circumstances surrounding consideration of a Massachusetts law enacted in 1754 requiring purchasers of liquor to report to the tax collector the amount spent on liquor each year. If anything, the episode reflects an understanding that the privilege was limited to criminal cases. It is not clear that the purchaser would have exposed himself to a fine or penalty of any nature merely by subscribing to the oath acknowledging liquor purchases, although the oath may

have disclosed some purchases on which taxes were not paid. Samuel Cooper, an opponent of the oath, referred to the privilege and noted that a requirement that a person clear himself of "innocent" behavior—*i.e.*, purchasing liquor—was equally pernicious. Cooper characterized the privilege as holding that "no Man is held to *convict* himself in any Affair whereof he is *accus'd*" (emphasis added), suggesting that only compulsory self-accusation of a criminal offense was protected, and said that a supporter of the practice "could a fortiori prove, that this practice is defensible in 'Criminal Cases' " (emphasis added). Levy, *supra*, at 386.

Finally, respondent relies on two celebrated instances of forfeiture of vessels or money in the Courts of Vice Admiralty. Using writs of assistance, customs officials were authorized in the mid-eighteenth century to search for contraband on vessels in American ports in violation of revenue or trade laws. The customs officials were then empowered to bring an action for penalties or forfeitures in the Courts of Vice Admiralty, which followed civil, not common law. The cases were initiated by accusation or information, not indictment; there was no right to a jury trial, as there was in common law courts; and examination of witnesses could be conducted in secret. See generally Levy, *supra*, at 395. Indeed, these actions were often brought in the Courts of Vice Admiralty, rather than in the common law courts having concurrent jurisdiction over them, in order "to have access to a forum not controlled by the obstinate resistance of American juries" to the Navigation Acts.

See *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 141 (1943).

In one of the incidents upon which respondent relies, a ship belonging to Henry Laurens of South Carolina was seized for technical violations of the law. As part of the proceedings, the court required the searcher of the port to take an oath of calumny that he was not maliciously motivated in seizing the ship, thereby insulating the searcher from liability to Laurens in any damage action for seizing the vessel without probable cause. In publicly denouncing proceedings in the Court of Vice Admiralty, Laurens and his supporters appeared to confuse the oath of calumny with compelled self-incrimination. In any event, the presiding judge in the Vice Admiralty Court replied to Laurens' charges that the procedure was in violation of the privilege by noting that the privilege in question applied where a person must "accuse himself criminally," and this was not, the judge said, a criminal case. Levy, *supra*, at 395-397.

Similarly, John Hancock's vessel *Liberty* was seized, condemned, and forfeited, and an action, *Sewall* v. *Hancock*, was brought *in personam* against Hancock in the Court of Vice Admiralty in Boston for forfeiture of money in three times the amount of goods forfeited. John Adams argued that suits for penalties and forfeitures in such courts violated the English constitution because these cases should be tried in open court before juries with open examination of all concerned. See generally 2 L. Wroth and H. Zobel, *Legal Papers of John Adams* 172-210 (1965). There was, as respondent points out (Resp.

Br. 23), published opposition to the "Star Chamber Proceedings" of the Vice Admiralty Court because of the inquisitorial method of examining citizens in private in hopes that evidence supporting the charges could be found. Levy, *supra*, at 397-398. But there is no indication in *Sewall* v. *Hancock*, as there was none in the Laurens case, that any witness was forced to testify in a manner that would have exposed him to forfeiture. *Id.* at 398. Thus, while the episodes reflect a decided opposition to the secret procedures utilized in forfeiture proceedings in the Courts of Vice Admiralty (which proceedings were perceived as highly penal in character, *Wroth and Zobel*, *supra*, at 188 n.62, 197-198), they shed little light on the scope of the privilege later incorporated in the Fifth Amendment.

d. It is against this background that the Congress expressly limited the Fifth Amendment privilege to "criminal cases." Because the history cited by respondent prior to ratification does not reflect an accepted recognition of the privilege (as opposed to equitable rules of discovery) going beyond a right to refuse to testify where the result would be to expose the individual to criminal liability, there is simply no basis for respondent's unsupported assertion that "by leaving the wording 'criminal' in the self-incrimination clause, * * * the protection would still extend to fines and forfeitures, regardless of their characterization by the legislature" (Resp. Br. 25-26). To the contrary, the inference can only be that Congress meant what it said. It did, after all, use the term "criminal prosecution" in describing the

cases in which an accused is entitled to the various procedural protections afforded by the Sixth Amendment, and there is no reason to believe that Congress intended the word "criminal" to have different meanings in the two amendments.[5]

It is particularly instructive in this regard that Congress separately addressed the very concerns reflected in the English discovery cases cited by respondent when it enacted the Judiciary Act of 1789. This was, of course, during the First Congress, when the Bill of Rights was considered and proposed to the States. Section 15 of the Judiciary Act, ch. 20, 1 Stat. 82, provided that all courts of the United States shall have the power in the trial of actions at law "to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery*; * * *" (emphasis added). The purpose of this provision was to avoid the necessity for a party in a civil suit to file a separate bill in equity to compel discovery. *Geyger's Lessee* v. *Geyger*, 2 U.S. (2 Dall.) 332, 333 (Cir. Ct. Pa. 1795). The emphasized

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[5] The various state conventions assembled to ratify the Constitution that recommended adoption of an amendment similar to that later included in the Self-Incrimination Clause all expressly limited their concern to persons accused or suspected of a crime. See, *e.g.*, 1 Elliot, *Debates on the Federal Constitution* 328 (New York) (2d ed. 1836); 3 Elliot, *Debates on the Federal Constitution* 447-448, 481-482, 658 (Virginia) (1836); see Levy, *supra*, at 420-421; Note, note 2, *supra*, 49 Colum. L. Rev. at 90-91.

phrase in Section 15 incorporated the various rules of chancery pertaining to bills of discovery, presumably including that denying compelled discovery which might tend to convict a party or forfeit his property. *Boyd* v. *United States*, 116 U.S. 616, 631 (1886). There is no reason to believe, however, that when Congress proposed the Fifth Amendment to the Constitution in response to fears of quite different origin regarding the criminal process, it *sub silentio* constitutionalized the rules of chancery existing at the time of ratification in civil disputes between private parties.

2. Respondent has not demonstrated on the basis of post-ratification precedent that the Fifth Amendment was intended to embody all aspects of the maxim that equity will not aid a forfeiture or penalty. He does cite (Resp. Br. 26-31) a number of state cases in which witnesses were excused from testifying on the ground that their testimony might subject them to a "penalty" or "forfeiture" in addition to possible criminal liability. But these cases were based on non-constitutional rules of evidence derived from the equitable maxim just stated (see, *e.g.*, *Poindexter* v. *Davis*, 6 Grat. 481, 490 (Va. 1850) (Resp. Br. 28); *Bryan* v. *State*, 40 Ga. 688, 689 (Ga. 1870) (Resp. Br. 29)); none relied on the privilege against self-incrimination contained in the Fifth Amendment or comparable provisions in the respective state constitutions.

Moreover, Wigmore notes that, prior to 1868, the privilege had been mentioned in only 15 reported federal cases, *and in none was the Constitution re-*

ferred to. 8 Wigmore, *supra*, § 2252, at 325. Wigmore suggests that the absence of litigation on the scope of the constitutional privilege probably resulted from the fact that until the end of the nineteenth century, a criminal defendant was not permitted to testify because of his interest in the case and the "question of the application of the narrow constitutional clause [therefore] never arose. The broader protection—of witnesses, and in civil cases—was given during the first years of this nation solely on the basis of well-established common law, without reference to constitutions" (*id.* at 324-325).

Thus, when the Court considered the scope of the Fifth Amendment privilege in *Boyd* v. *United States*, *supra*, the case upon which respondent principally relies (Resp. Br. 32-34), it wrote on a relatively clean slate. The decision in *Boyd* is written in sweeping language, and "[s]everal of *Boyd's* express or implicit declarations have not stood the test of time." *Fisher* v. *United States*, *supra*, 425 U.S. at 407. See generally, *id.* at 407-414; *Andresen* v. *Maryland*, *supra*, 427 U.S. at 471-473. But despite the broad language of the opinion generally, the precise holding of the Court on the question whether the Fifth Amendment privilege applied in the particular forfeiture proceeding before it was that "proceedings instituted for the purpose of declaring the forfeiture of a man's property, *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal" for purposes of the Fifth Amendment privilege. 116 U.S. at 634 (emphasis added). The Court was careful to point out that the forfeiture

was, like the provision for imprisonment or fine for violation of the statute, one of the "penalties affixed to the criminal acts." 116 U.S. at 634. Thus, although there may be some question whether the Court in *Boyd* correctly extended the Fifth Amendment privilege to a forfeiture proceeding that was not actually a "criminal case," the Court's decision is nonetheless rooted in that deliberately limiting phrase of the Amendment because the opinion stresses that liability for a forfeiture under the statute involved was dependent on the commission of an underlying criminal offense.

Respondent also errs in relying (Resp. Br. 33-34) on the *Boyd* Court's discussion of Section 15 of the Judiciary Act of 1789, which permitted courts of the United States to compel discovery under circumstances where discovery might be compelled under ordinary rules of proceedings in chancery. See 116 U.S. at 630-632; pages 11-12, *supra*. The Court reasoned that the views of the first Congress on the question of compelling a person to produce evidence against himself could be "inferred" from what the Court termed this "remarkable" Section 15. 116 U.S. at 630-631. But there was nothing in the least remarkable about Section 15 or its incorporation of rules of chancery. Cf. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 95-96 (1923). Congress simply mandated that established discovery procedures be followed, but without the necessity of filing a separate bill in equity. Thus, although Section 15 certainly does reflect the views of the first Congress with respect to the production of documents in civil law suits, we must conclude that the Court was mistaken if it meant to suggest that a congressional intent to constitutionalize all aspects of the rules of chancery pertaining to penalties and forfeitures could likewise be "inferred" from Section 15. Indeed as noted above (see note 2, *supra*), several commentators have stated that the proposed privilege was amended on the House floor to restrict it to "criminal cases" for the very purpose of preventing any overlap with Section 15 of the Judiciary Act.

Subsequent decisions by this Court, relied upon by respondent (Resp. Br. 34-39, 43-45), have confined the holding in *Boyd* to forfeiture or penalty proceedings that were dependent on the commission of an underlying criminal offense. In *Lees* v. *United States*, 150 U.S. 476, 479-480 (1893), the Court noted that the statutory penalty involved could have been recovered in either a criminal or civil action and stressed that it was intended as punishment, thereby underscoring a nexus to a criminal offense. In *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971), the Court stressed that the particular forfeiture under the internal revenue laws before the Court could be imposed "only upon those who are significantly involved in a criminal enterprise." The Court reiterated this reading of *Boyd*, as limited to situations in which the forfeiture is dependent on commission of a criminal offense, in *One*

Lot Emerald Cut Stones v. *United States*, 409 U.S. 232, 236, n.6 (1972).[6] See generally Pet. Br. 47-52. There is, accordingly, no occasion to import respondent's novel construction of the phrase "criminal case" into the Fifth Amendment at this late date.[7]

[6] *One Lot Emerald Cut Stones* also demonstrates the error in respondent's reliance on *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), for the proposition that the holding of the Court in *Boyd* regarding the application of the Fourth Amendment extends to all forfeiture proceedings. As the Court pointed out in *One Lot Emerald Cut Stones*, the Court's decision in *One 1958 Plymouth Sedan* "dealt with a forfeiture that could not be had without a 'determination that the criminal law has been violated'" (409 U.S. at 236 n.6, quoting 380 U.S. at 701).

[7] A number of immunity statutes considered by the Court over the years provided that evidence produced by a party pursuant to court order could not be used against him in any criminal prosecution or for imposition of a penalty or forfeiture. See, *e.g.*, *Boyd* v. *United States*, *supra*, 116 U.S. at 632 (Act of February 25, 1868, ch. 13, 15 Stat. 37); *Brown* v. *Walker*, 161 U.S. 591, 593-594 (1896) (Act of February 11, 1893, ch. 83, 27 Stat. 443); *Counselman* v. *Hitchcock*, 142 U.S. 547, 560 (1892) (Act of February 25, 1868); *Ullmann* v. *United States*, 350 U.S. 422, 423-424 (1956) (Immunity Act of 1954, ch. 769, 68 Stat. 745). Aside from the opinion in *Boyd*, which held that the immunity provision in the Act of February 25, 1868, had been superseded with respect to the case before it by a statute that did not provide immunity from use of evidence to enforce a penalty or forfeiture (116 U.S. at 632-633), the other decisions did not directly discuss the constitutional significance of this immunity from penalties and forfeitures. But cf. *Counselman* v. *Hitchcock*, *supra*, 142 U.S. at 564 (suggesting that immunity need extend in actions against a person or his property only "in a criminal proceeding").

However, it does not appear that the original extension of immunity to enforcement of penalties or forfeitures in these statutes necessarily stemmed from constitutional concerns. It might be expected, for example, that Congress would import into these immunity statutes an immunity as broad as necessary to meet the usual rule that discovery would not be compelled where a forfeiture or penalty might result. Indeed, the common law principle derived from the rules of chancery was invoked during the debates in support of the Act of February 25, 1868, and no reference was made to the constitutional privilege. See 78 Cong. Globe 950-951, 1334 (1868). The brief debates on the Act of February 11, 1893, contain no discussion of the forfeiture and penalty language. 23 Cong. Rec. 6332-6333 (1892); 24 Cong. Rec. 335, 503, 708-709 (1893). The reports on the Immunity Act of 1954 are also unilluminating. S. Rep. No. 153, 83d Cong., 1st Sess. (1953); H.R. Rep. No. 2606, 83d Cong., 2d Sess. (1954). It is also of note that Congress soon narrowed the scope of the first immunity statute, Act of February 5, 1857, ch. 19, 11 Stat. 156, providing immunity for witnesses before congressional committees from criminal prosecution or penalties or forfeitures, to provide immunity only from the use of evidence in criminal proceedings. Act of January 24, 1862, ch. 11, 12 Stat. 333. This was intended to correspond to the constitutional privilege. 57 Cong. Globe 429 (1862) (remarks of Rep. Sumner).

The general immunity statute enacted in 1970, 18 U.S.C. 6002, does not contain an immunity for enforcement of penalties and forfeitures. This provision was based on "a comprehensive study of immunity and the relevant decisions of this Court, prepared for the Commission by Prof. Robert G. Dixon, Jr., * * * and transmitted to the President with the recommendations of the [National Commission on Reform of Federal Criminal Laws]." *Kastigar* v. *United States*, 406 U.S. 441, 452 n.36 (1972). Prof. Dixon noted that the phrase "penalty or forfeiture" does not appear in the Fifth Amendment and that its derivation in immunity statutes was unclear. He recommended deleting it from immunity statutes, and including merely the constitutional language "criminal case," leaving to case-by-case adjudication whether a particular for-

3. Respondent's argument (Resp. Br. 40-43, 46-70) that the "civil penalty" in the present case is in fact

"criminal" for purposes of the Self-Incrimination Clause, even if *all* forfeitures and penalties are not embraced by that Clause, is fully discussed in our opening brief, and will not be separately addressed here.

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

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feiture or penalty was within the ambit of Fifth Amendment protection. However, if broader language was thought necessary, he suggested the statute provide that a person granted immunity shall not be "prosecuted or subjected to any *criminal* penalty or *criminal* forfeiture." II National Commission on Reform of Federal Criminal Laws, *Working Papers* 1414-1416, 1432-1433 (1970) (emphasis added). The latter formulation was not adopted, but it reflects a reading of *Boyd* that is fully consistent with our position herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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UNITED STATES OF AMERICA, PETITIONER

v.

L.O. WARD d/b/a
L.O. WARD OIL AND GAS OPERATIONS, RESPONDENT

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE AMICI CURIAE: MOUNTAIN STATES LEGAL FOUNDATION, INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES, ROCKY MOUNTAIN OIL & GAS ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

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BRIEF OF THE AMICI CURIAE:
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ROCKY MOUNTAIN OIL & GAS ASSOCIATION,
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

INTEREST OF THE AMICI

The Mountain States Legal Foundation (MSLF) is a nonprofit, membership, public interest legal organization dedicated to bringing before the courts those issues vital to the protection and defense of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect its members and the public from costly, overly intrusive, and unnecessary governmental regulation.

The Independent Petroleum Association of the Mountain States (IPAMS) is a nonprofit trade association of independent oil and gas producers in 11 western states, dedicated to representing the common interests of those independent

producers before governmental authorities and other entities concerned with oil- and gas-related issues.

The Rocky Mountain Oil & Gas Association (RMOGA) is a nonprofit trade association of individuals and independent and major companies involved in every phase of oil and gas exploration, production, transportation, refining and marketing in the Rocky Mountain region. RMOGA is dedicated to promoting the accumulation, dissemination, and discussion of information concerning the petroleum industry to foster the best interests of the public and the industry.

The Independent Petroleum Association of America (IPAA) is a national organization of independent explorer-producers of crude oil and natural gas, dedicated to representing the common interests of those independent explorer-producers before governmental authorities and other entities concerned with oil- and gas-related issues.

These four organizations, MSLF, IPAMS, RMOGA, and IPAA, and their members, all share the common concern that a judicial decision supporting the Government's position in this case will permit Congress to expand its use of the highly offensive practice of compelling individuals, by threat of fine or imprisonment, to admit to statutory violations in order to use those admissions as the basis for imposing automatic penalties, to other areas of governmental regulation.

The amici have received written consent from Ward and the United States to file this brief. Copies of these letters have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The amici generally agree with the statement of the case prepared by the United States [hereinafter "the Government"]. The following synopsis is offered simply for the purpose of highlighting those facts which the amici consider especially significant.

A relatively minor quantity of oil spilled from a retention pit owned by L.O. Ward Oil and Gas Operations, a sole proprietorship, into navigable waters. When L.O. Ward became aware of the oil spill, he cleaned it up and reported it to the

Environmental Protection Agency (EPA), as required by section 311(b)(5) of the Federal Water Pollution Control Act (FWPCA)[1] [hereinafter §311(b)(5)].[2] Section 311(b)(5) requires that any discharge of oil in violation of section 311(b)(3) of the FWPCA [hereinafter §311(b)(3)][3] be reported to EPA, with the failure to report punishable by fine or imprisonment. When EPA received Ward's report, it forwarded a copy to the Coast Guard. Then, solely on the basis of that report, the Coast Guard, acting pursuant to section 311(b)(6) of the FWPCA [hereinafter §311(b)(6)][4] assessed a $500 penalty against Ward for his violation of §311(b)(3).

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[1]The amici have, to the extent possible, adopted the abbreviations used by the Government in its brief, including the use of FWPCA to refer to the Clean Water Act prior to the 1977 amendments. *See* Brief for the United States at 3 n.1.

[2]Section 311(b)(5) of the FWPCA states: "Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

[3]Section 311(b)(3) of the FWPCA states: "The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President . . . is prohibited . . . ."

[4]Section 311(b)(6) of the FWPCA states: "Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary . . . ."

SUMMARY OF ARGUMENT

The unique statutory enforcement mechanism of the FWPCA, which combines a self-reporting requirement [§311(b)(5)] with an automatic penalty [§311(b)(6)] for statutory violations [§311(b)(3)], is a highly oppressive and improper use of governmental power, regardless of whether the penalty is intended as a punishment or simply as compensation to the government for injuries to navigable waters. But the general impropriety of the mechanism need not be resolved since the §311(b)(6) penalty is criminal in nature, and the mechanism therefore unquestionably violates the Fifth Amendment privilege against self-incrimination by completely eviscerating the accusatorial system of justice through the requirement that an individual, under pain of fine or imprisonment, impose a punishment on himself, through his own testimony.

The Fifth Amendment to the Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself." The facts of the case at bar reveal that Ward is a natural person and that he was compelled to be a witness against himself by a statutory provision which required, on pain of fine or imprisonment, that he furnish the EPA with testimonial evidence admitting his violation of the FWPCA, which evidence was then used as the sole basis for imposing the §311(b)(6) penalty on him. The sole remaining issue necessary to determine the applicability of the Fifth Amendment privilege is: Is the imposition of the §311(b)(6) penalty a "criminal case" for purposes of the Fifth Amendment?

It would seem that the simplest way to resolve that issue would be to define the term "criminal case" within the Fifth Amendment context and then apply that definition to the facts of the case. However, the necessary analysis is not that simple. The amici believe that their brief is unique in its attempt to examine and clarify the nature of the proper judicial inquiry in this case and to identify those distinctions which must be recognized to apply that inquiry properly.

The question of whether a penalty such as the §311(b)(6)

penalty is "criminal" for purposes of the Fifth Amendment privilege is one of first impression, since it requires the Court to address simultaneously the issue of whether the §311(b)(6) penalty is punitive in nature and the issue of whether the §311(b)(5) self-reporting requirement violates the Fifth Amendment privilege. An understanding of the relationship between these two issues is essential because only if both issues are considered in proper sequence and are approached as distinct yet vital parts of the proper judicial inquiry can a sound analysis of the case at bar be achieved.

The standard judicial inquiry for determining whether a statute is criminal/penal in nature is a simple matter of statutory construction which focuses on whether or not the congressional purpose in enacting the statute was punitive. The tools of this inquiry are statutory language, legislative history, statutory context, and the indicators set forth by this Court in *Kennedy v. Mendoza-Martinez,* 272 U.S. 144 (1963). The application of this standard judicial inquiry into the penal nature of statutes has suffered from three significant, and not altogether unrelated, abuses which have created a great deal of confusion. First, in seeking to determine whether the purpose of a statute is punitive or nonpunitive, the courts in their opinions and the Government in its brief in this case have framed the inquiry using ambiguous terms like "civil," "regulatory," and "remedial," which has hindered their efforts to distinguish punitive and nonpunitive purposes. Second, in seeking to determine the nature of the penalty, the courts and the Government have improperly relied on cases which did not focus on the nature of the penalty involved but instead focused on constitutional protections not at issue in this case. Third, in ostensibly examining and applying the indicators of congressional intent to the facts of a case, the courts and the Government have permitted their unarticulated judgments about the importance of the constitutional protections at stake to influence their interpretations of the intent indicators. These errors must not be left unrecognized since it is on the basis of these errors and little else that the Government supports its position in this case.

The statutory language, legislative history, and statutory context of §311(b)(6), and the application of the *Mendoza-*

Martinez factors demonstrate that Congress' purpose in enacting §311(b)(6) was punitive. Section 311(b)(6) is described as a "penalty" which by definition means "punishment." The legislative history of statutory sections analogous to §311(b)(6) indicates that the purpose of the penalty was to deter that conduct which caused or permitted oil spills, revealing that Congress' concern was with the punitive effect which the penalty would have on persons subject to it and not with being compensated for injuries or collecting revenue. The statutory context of §311(b)(6) confirms a punitive purpose.

The *Mendoza-Martinez* factors also indicate a punitive intent. The fact that five different courts have applied the *Mendoza-Martinez* factors to the §311(b)(6) penalty permits a unique opportunity to study the application and use of the factors. The amici have set forth a table comparing the various §311(b)(6) decisions in the appendix to this brief.

For the sake of analytical accuracy, it is only *after* having sought to determine the congressional purpose behind the penalty that the values of the constitutional protection at stake should be considered. If the inquiry into the purpose of the statute reveals that it is punitive, then the Fifth Amendment privilege must be applied and the inquiry ends. This is the conclusion reached by the Tenth Circuit Court of Appeals and the amici urge the Court to affirm its reasoning. However, even if the Court does not find that a punitive intent has been conclusively demonstrated, the Fifth Amendment privilege should still be found to apply in this case. The principle established by this Court in the self-reporting cases requires that uncertainties be resolved in favor of the application of the privilege in this case since the likelihood that the penalty is punitive in nature is substantial and the governmental interest at stake is comparatively insignificant.

The Tenth Circuit Court of Appeals' decision barring use of the §311(b)(5) report as the basis for imposing the §311(b)(6) penalty should be upheld. That decision properly recognizes and effectuates the purposes of the Fifth Amendment privilege without threatening the viability of the enforcement scheme of the FWPCA.

ARGUMENT

The issue which Ward and the Government presented to the Tenth Circuit Court of Appeals was: Is Ward entitled to claim the Fifth Amendment privilege against self-incrimination in a proceeding by the government to collect the §311(b)(6) penalty from him? MSLF, IPAMS, and RMOGA, in their amici brief and their oral argument before the Tenth Circuit,[5] argued that that issue was unnecessarily broad. The amici pointed out that since Ward was a natural person, since §311(b)(5) compelled his report to EPA, since his report was testimonial in nature and since his report led directly to the imposition of the §311(b)(6) penalty, the court could find that at least four of the five elements necessary for the application of the Fifth Amendment privilege[6] were unquestionably present. The Tenth Circuit so held (Pet. App. 6a-7a) and the Government has not appealed that holding. The only remaining issue before this Court is the one which the amici framed for the Tenth Circuit: Is the imposition of the §311(b)(6) penalty a "criminal case" for the purposes of the Fifth Amendment privilege against self-incrimination?

In its simplest form, the resolution of this issue requires only a determination of what constitutes a "criminal case" for purposes of the Fifth Amendment privilege and a determination of whether the facts of the present case satisfy that definition. But the necessary analysis is more complex. The *Ward* case is a case of first impression. It is not a case of first impression because it requires the Court to determine whether or not a statute like §311(b)(6) is punitive in nature. As this

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[5]MSLF, IPAMS and RMOGA submitted an amici brief to the Tenth Circuit and were granted special leave of the court, and additional time, to present oral argument. The decision of the Tenth Circuit in this case reflects much of these amici's analysis. IPAA, which joins MSLF, IPAMS and RMOGA on this brief, submitted its own amicus brief to the Tenth Circuit.

[6]The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This language reveals the five elements necessary for the application of the privilege against self-incrimination: (1) a person, (2) compulsion, (3) a criminal case, (4) testimony, and (5) incrimination (a causal link between the testimony and the criminal case).

Court observed in *Trop v. Dulles,* 356 U.S. 86, 96 (1958): "This Court has been called upon to decide whether or not various statutes were penal ever since 1798." It is also not a case of first impression because it requires the Court to examine a self-reporting requirement like §311(b)(5) in light of the Fifth Amendment privilege against self-incrimination. *See,e.g., California v. Byers,* 402 U.S. 424 (1971); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *United States v. Sullivan,* 274 U.S. 259 (1927) [hereinafter "the self-reporting cases"]. It is a case of first impression because, for the first time, this Court must address these two issues in conjunction with one another and decide how the separate and distinct lines of cases affecting each apply when the two issues are resolved simultaneously. The effect of combining a self-reporting requirement like §311(b)(5) and an automatic penalty like §311(b)(6) proves the proposition that the whole is often greater than the sum of its parts.

The relationship between the question of whether the §311(b)(6) penalty is punitive and the question of whether the §311(b)(5) self-reporting requirement violates the Fifth Amendment privilege against self-incrimination is not complex, but it is essential. As this brief will show, this case demands, at the very least, the recognition that both the nature of the sanction and the nature of the constitutional protection involved must be taken into account in determining the issue before the Court.

I. THE FWPCA'S ENFORCEMENT MECHANISM, WHICH COMBINES A SELF-REPORTING REQUIREMENT WITH AN AUTOMATIC PENALTY FOR STATUTORY VIOLATIONS, IS AN ABUSIVE AND IMPROPER USE OF GOVERNMENTAL POWER.

It has been said that a society is judged by the way it treats its criminals. *See generally Miranda v. Arizona,* 384 U.S. 436,

480 (1966). It could be as appropriately said that a society is judged by the way it treats its citizens. If the Fifth Amendment privilege against self-incrimination protects the rights of criminals and insures a fair government-individual balance in the criminal justice system, it must no less protect the rights of ordinary citizens whose property and freedoms are threatened by oppressive regulatory schemes such as the one before this Court today.[7]

If one looks at the elements of the FWPCA's unique[8] enforcement scheme *individually,* they do not seem particularly offensive. Section 311(b)(3), which prohibits all discharges of harmful quantities of oil, is not unreasonable. The §311(b)(5) requirement that oil spills be reported to the government is not, in itself, that objectionable. Nor is the §311(b)(6) penalty, which imposes a fine of up to $5,000 on the discharge of oil, in itself, particularly objectionable. But it takes little argument to show that the combination of these provisions is highly oppressive.

Section 311(b)(3) prohibits the discharge of oil into navigable waters. Section 311(b)(5) requires that those spills *which violate §311(b)(3)* be reported. Section 311(b)(6) makes all individuals and companies discharging oil in violation of §311(b)(3) automatically liable for a penalty of up to $5,000 for each violation, regardless of whether the discharge was the result of any event which the individual or company could control. In enforcing the §311(b)(6) penalty, the mandate of the Coast Guard is to collect the penalty for every violation of

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[7]The Court eloquently described the purposes of the Fifth Amendment privilege in these terms in *Miranda v. Arizona,* 384 U.S. 436, 460 (1966): "The constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a fair state-individual balance, to require the government to shoulder the entire load, to respect the inviolability of the human personality, our accusatorial system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

[8]It appears that the FWPCA is the only statute in which Congress has combined a compelled report with an automatic penalty. *See United States v. LeBeouf Bros. Towing Co.,* 377 F. Supp. 558, 566 (E.D. La. 1974), *rev'd,* 537 F.2d 149 (5th Cir. 1976).

§311(b)(3). Brief for the United States [hereinafter "Gov't Brief"] App. at 3a.

In essence, §311(b)(5) forces those who violate §311(b)(3) to impose the §311(b)(6) penalty on themselves, thereby saving the government all that work. The §311(b)(5) report notifies the government in the first instance that a spill which violates §311(b)(3) has occurred. Then the report, in and of itself, proves all the elements of a violation of §311(b)(3). On the basis of the report alone, as in this case, the Coast Guard can collect the §311(b)(6) penalty.

If the §311(b)(6) penalty is "criminal" in nature there can be no question but that this enforcement scheme violates the Fifth Amendment privilege. It totally eviscerates the accusatorial system of justice. However, even if the §311(b)(6) penalty is not "criminal" in nature, the Court's concern should not end, because the Court's approval of the FWPCA's enforcement scheme would still permit an improper extension of the government's power. This is illustrated by the following analysis.

In many cases, the courts have recognized the government's right to wear two hats, to act both as the government and as an individual. For example, this Court has held that the government can bring both a criminal and a civil (tort) action for the same offense without violating the double jeopardy clause, reasoning that the right of the government *qua* government to punish an offense against the public good should not deprive the government of the separate and distinct right to act as an individual to obtain redress for injuries.[9] *See, e.g., Rex Trailer Co. v. United States,* 350 U.S. 148, 151 (1956).

In the present circumstances, however, *even if* the government's purpose in enacting the §311(b)(6) penalty was to obtain compensation for irremediable injuries to navigable

[9]This reasoning comports with the traditional distinction between a crime and a tort: "Although the same act may constitute both a crime and a tort, the crime is an offense against the public pursued by the sovereign while the tort is a private injury which is pursued by the injured party." 21 Am. Jur. 2d *Criminal Law* §2 (1965). The fact that the government is the government does not prevent it from also being the injured party in some cases.

waters (which the amici will show conclusively that it was not), the Court should be wary. For what the government would be seeking to do, even in that instance, would not be to exercise *separately* its power to act as the government and its power to act as an individual, but to exercise both powers at once in order to unjustly maximize the advantages of each. On one hand, it is in its capacity as the government that the government can require this nation's citizens to report to it on their activities. One individual cannot similarly require such reports from other individuals. On the other hand, it is in its capacity *as an individual,* and not as the government, that the government can seek to recover compensation for injuries done to it. By merging its governmental and individual capacities, the government seeks to avoid the limitations of each. It would be seeking to avoid the Fifth Amendment limitation on its governmental power, which limitation bars it from compelling persons to report to it on those activities which it punishes as being contrary to the public good, by arguing that it is only seeking a report on those activities which injure it and not on those activities which are contrary to the public good, even though the activities themselves could be described both as contrary to the public good and as injurious to the government. At the same time, the government would be seeking to avoid the primary limitation and burden which, in almost every instance, rests on the individual who seeks compensation, which is that the person seeking compensation must identify the person who has injured him and prove the case against that person *by his own individual efforts.* Even if the government were only seeking compensation through the §311(b)(6) penalty, it would be unfairly, albeit effectively, utilizing its governmental powers to further its own "individual" purposes.

Historically it has been the government's use of the criminal justice system which has had to be carefully restricted to protect the citizens' rights and freedoms against oppression. However, if statutory schemes like that at bar become the order of the day it will be ever-burgeoning "efficient" regulation which ultimately jeopardizes our most precious

individual rights.[10]

In the case at bar, however, the Court should not have to deal with the question of the lawfulness of a mechanism designed to require tortfeasors to confess their torts and to redress the government for the resulting injuries, since, as the remainder of the brief will show, the § 311(b)(6) penalty is "criminal" for purposes of the Fifth Amendment privilege.

II. THE APPLICATION TO THE FACTS OF THIS CASE, OF THE STANDARD JUDICIAL INQUIRY USED IN DETERMINING THE PENAL NATURE OF A STATUTE CONCLUSIVELY DEMONSTRATES THAT THE §311(b)(6) PENALTY IS PUNITIVE IN NATURE.

A. DEFINING THE STANDARD JUDICIAL INQUIRY USED IN DETERMINING THE PENAL NATURE OF A STATUTE.

1. The Standard Judicial Inquiry in Cases Involving Constitutional Protections Goes Beyond Congressional Labels.

Alexander Hamilton, in Federalist Paper No. 78, observed that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." In order to fulfill this function, the courts, in reviewing statutory enactments in light of the Constitution's protections of the people's rights, have never considered themselves bound by Congress' own description of its actions. *In re Gault,* 387 U.S. 1, 50 (1967); *United States v. Constantine,* 296 U.S. 568, 572 (1931). To grant such deference to congressional labels would vest the "improper

[10]Although the statutory scheme involved in this case is unique, there is no guarantee that it may not be expanded to other areas of regulation, given its advantages to the government. For one description of another possible use, *see United States v. LeBeouf Bros. Towing Co.,* 377 F. Supp. 558 (E.D. La. 1974), *rev'd.,* 537 F.2d 149 (5th Cir. 1976).

and dangerous power in the legislature" to make that which is wrong, right simply by so labeling it. *Cf. Powell v. McCormack,* 395 U.S. 486, 531 (1969). For this reason, the courts, in cases with constitutional implications, have searched for the substance behind the form.

This principle has a twofold application in this case. First, the term "criminal case" within the meaning of the Fifth Amendment privilege has not been limited by the courts simply to those proceedings in which the laws Congress has labeled as criminal are enforced.[11] Second, the courts have not held themselves bound by the fact that Congress has deliberately labeled as civil a sanction which is punitive in nature.[12]

2. The Standard Judicial Inquiry into the Penal Nature of a Statute Focuses Primarily on the Purpose of the Statute.

When statutes have been challenged in light of the due process clause, the double jeopardy clause, and the prohibitions against bills of attainder, ex post facto laws, and cruel and unusual punishment, among other constitutional provisions, the courts have often needed to determine whether or not a statute was penal in nature. As the Court in *Rex Trailer Co. v. United States,* 350 U.S. 148, 150 (1956), explained its inquiry in determining the application of the double jeopardy clause: "The only question for our decision, then, is whether §26(b)(1) is civil or penal." Similarly, the Court in *Stockwell v. United States,* 13 Wall. 531, 546 (1871), explained the test it used to determine whether an action had

[11]The Fifth Amendment privilege against self-incrimination has been held applicable to proceedings before a grand jury, *Counselman v. Hitchcock,* 142 U.S. 547 (1892); to civil proceedings, *McCarty v. Arndstein,* 266 U.S. 39 (1924); to police custodial interrogations, *Miranda v. Arizona,* 384 U.S. 426 (1966); to juvenile proceedings, *In re Gault,* 387 U.S. 1 (1967); to congressional investigations, *Watkins v. United States,* 354 U.S. 178 (1957); and to other statutory inquiries, *Malloy v. Hogan,* 378 U.S. 1 (1964).

[12]*See In re Gault,* 387 U.S. 1, 49 (1967); *Trop v. Dulles,* 356 U.S. 86, 94 (1958), *United States v. Constantine,* 296 U.S. 287, 294 (1935); *United States v. La Franca,* 423 F. Supp. 1352 (W.D. Okla. 1976).

to be brought by criminal indictment: "It becomes, then, material to consider the nature and purposes of the statute under which it is claimed the liability of the defendants has arisen. Is it strictly punitive, or is it remedial?" Likewise, in *Trop v. Dulles,* 356 U.S. 86, 96 (1958), the Court described a similar test: "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved. . . ." For other examples of inquiries into the penal nature of statutes, *see generally Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164 (1963) (due process and trial by jury); *Flemming v. Nestor,* 363 U.S. 603, 613-614 (1960) (due process); *United States v. Lovett,* 328 U.S. 303 (1946) (ex post facto law); *Helvering v. Mitchell,* 303 U.S. 391, 398-399 (1938) (double jeopardy); *United States v. La Franca,* 282 U.S. 568, 572 (1931) (double jeopardy); *Lipke v. Lederer,* 259 U.S. 557, 562 (1922) (due process clause); *United States v. Chouteau,* 102 U.S. 603, 611 (1880) (double jeopardy); *Calder v. Bull,* (U.S.) 3 Dall. 386, 1 L. Ed. 648 (1798) (bill of attainder).

The inquiry for determining whether or not a statute is penal is plainly stated in *Trop v. Dulles, supra* at 96:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment — that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

The objective of the standard judicial inquiry is to determine whether Congress' *purpose* in enacting the statute was punitive.

*a. TO DETERMINE ACCURATELY WHETHER THE PURPOSE OF A STATUTE IS TO PUNISH, ALL THE POSSIBLE PURPOSES FOR THE STATUTE MUST BE CHARACTERIZED IN UNAMBIGUOUSLY PUNITIVE OR NONPUNITIVE TERMS.

As the above analysis from *Trop v. Dulles* shows, the punitive purpose of a statute can be proven or disproven *directly* by showing a congressional intent to punish. Alternatively, it can be proven or disproven *indirectly* by showing a nonpunitive congressional purpose; the logical inference being that if the purpose is nonpunitive, it cannot also be punitive. It is the indirect proof which is most often misapplied. The inference that the proof of "A" disproves "Z" is correct only if "A" and "Z" are mutually exclusive. So long as the inquiry is framed in terms of punitive vs. nonpunitive intent, the indirect proof is probative. However, the inquiry is usually framed by the courts in terms of "criminal vs. civil," *see, e.g., Hepner v. United States,* 213 U.S. 103, 112 (1909); *Stockwell v. United States,* 13 Wall. 531, 542-3 (1871); "punitive vs. regulatory," *see, e.g., United States v. Marathon Pipeline Co.,* 589 F.2d 1305, 1308 n.11 (7th Cir. 1978); *United States v. Tex-Tow Inc.,* 589 F.2d 1310, 1315 (7th Cir. 1978); or "punitive vs. remedial," *see, e.g., United States ex rel. Marcus v. Hess,* 317 U.S. 537, 549 (1943); *Helvering v. Mitchell,* 303 U.S. 391, 399-400 (1938). This type of framing of the inquiry does not confuse the issue *as long as* the term "criminal" is defined in punitive terms and the terms "civil," "regulatory," and "remedial" are defined in nonpunitive terms.

But it is little more than a verbal shell game to argue that a proceeding is "civil" if punitive ends are pursued therein, to argue that a statute is "regulatory" if it is enforced by punitive sanctions, or to argue that a statute is "remedial," in the sense of beneficial, when the criminal laws can be similarly described. Only if the terms "civil," "regulatory," and "remedial" are defined in a nonpunitive manner are they useful in determining punitive intent. Therefore, it seems useful to set out the basic nonpunitive definitions of "civil," "regulatory," and "remedial," to distinguish other possible definitions, and to examine the use of these terms in the Government's brief.

"Civil:" In its broadest sense, "civil case" refers to all cases both at law and at equity which cannot legally be denominated criminal cases. *See Fenstermacher v. State,* 19 Or. 504, 25 P. 142 (1890); *Welford v. Harvard,* 127 Miss. 83, 89 So. 812, 813 (1921); Black's Law Dictionary 222 (5th ed.

1979). And, as has been recognized by this Court, proceedings which are "civil" in form may be punitive in nature. *See Boyd v. United States,* 116 U.S. 616, 634 (1886); *United States v. United States Coin & Currency,* 401 U.S. 715, 718 (1971). *See also* Justice Frankfurter's concurring opinion in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 554 (1943). The punitive-nonpunitive ambiguity in the word "civil" results largely from the fact that courts have used the term "civil" to describe those proceedings in which certain procedural rules did not need to be followed, rather than to describe cases in which no punitive sanctions were enforced. *See* the analysis at 19, *infra*. For example, this Court has long held that an action for debt was maintainable in a "civil proceeding" so long as a fixed sum was involved, *regardless* of the purpose for which the sum was imposed. *See, e.g., Hepner v. United States,* 213 U.S. 103 (1909); *Oceanic Steam Navigation Co. v. Stranahan,* 217 U.S. 320 (1909). For the purpose of determining the penal nature of a statute, the ambiguous term "civil" should be discarded and replaced by the word "compensation" which reflects the usual nonpunitive purpose of civil proceedings. "Compensation" is defined by Black's Law Dictionary 256 (5th ed. 1979) as:

> An act which a court orders to be done, or money which a court or other tribunal orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury. *Hughson Condensed Milk Co. v. State Board of Equalization,* 23 Cal.App.2d 281, 73 P.2d 290, 292.

It should be noted that the Government frames its entire brief in terms of the §311(b)(6) penalty being "civil," without ever defining the term. Gov't Brief at I-II, 26-48. The Government's broad use of the term suggests that it is not restricting its meaning to a compensatory intent. This introduces considerable ambiguity into its conclusions.

"Regulatory:" The term "regulatory," in its broadest governmental sense, has come to mean all statutes enacted and

all regulations promulgated by the government to govern the conduct of members of the public in their occupations and everyday activities, other than those statutes which make up the criminal laws. While statutes establishing regulatory standards may not be punitive in their nature, if those standards are enforced by sanctions against violators, the sanctions themselves are punitive. This point is well made in *Trop v. Dulles,* 356 U.S. 86, 97 (1957):

> It is urged that this statute is not a penal law, but a regulatory provision authorized by the war power. It cannot be denied that Congress has the power to prescribe rules governing the proper performance of military obligations, of which perhaps the most hazardous is the performance of one's duty when hazardous or important service is required. *But a statute that prescribes the consequences that will befall one who fails to abide by these regulatory provisions is a penal law.* (emphasis added)

The same logic is reflected in this Court's observation in *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)* 259 U.S. 20, 38 (1922), that when a "tax" is imbued with punitive purposes, "it loses its character as [a tax] and becomes a mere penalty with the characteristics of regulation and punishment."

It is impossible to find any intrinsic difference between the violation of a regulation and a crime when crimes are defined generally as "acts committed, or omitted, in violation of a public law forbidding or commanding them." *Schick v. United States,* 195 U.S. 65, 69 (1904); *United States v. Eaton,* 144 U.S. 677, 687 (1892). In effect, the criminal laws can be defined simply as a set of rules enacted for the purpose of regulating certain conduct of members of the public. It is the sanctions which are used to enforce both criminal laws and regulations which are punitive in nature. On the basis of these definitions, it is virtually impossible to distinguish most regulatory sanctions from criminal ones.

The Government in its brief at 40 refers to "essentially

regulatory deterrence," another ambiguous term. It would seem that if Congress' *purpose,* as described by the Government, was to promote deterrence of violations of §311(b)(3), then Congress must have intended the §311(b)(6) penalty to operate as a punishment; for it is punishment, no matter how mild or harsh, which promotes deterrence.

There are certain instances, however, in which the government can regulate without the use of punitive sanctions to enforce its regulations. These instances all involve affirmative disabilities and restraints. In such instances, the government may be able to regulate privileged occupations or franchises, as opposed to the conduct of individuals, by the nonpunitive use of affirmative disabilities. These regulatory purposes will be referred to as "nonpunitive regulatory" purposes for the sake of comparison with "punitive regulatory" purposes. Nonpunitive regulation through affirmative disabilities and restraints is discussed in much greater detail *infra* at page 36.

"Remedial:" Black's Law Dictionary 1162 (5th ed. 1979) defines a remedial action as "one which is brought to obtain compensation or indemnity, *Cummings v. Board of Education of Oklahoma City,* 190 Okla. 553, 125 P.2d 989, 994 (1942)." *See also Rex Trailer Co. v. United States,* 350 U.S. 149, 152 (1956); *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 548-49 (1943). But the Government uses the term "remedial" in a much broader sense, as almost synonymous with the word "beneficial," which does not necessarily mean "nonpunitive." For example, the Government refers to the FWPCA's "broad remedial purpose to maintain the integrity of the nation's waters" (Gov't Brief at 17), and to the "remedial purposes of preventing discharges" (Gov't Brief at 33). In this sense, the punishment of criminals can certainly be said to have the remedial purpose of improving the quality and safety of our society.

In the remainder of the brief, the inquiry into Congress' purpose in enacting §311(b)(6) is described in punitive or nonpunitive terms. The word "compensation" is used instead of "civil" or "remedial" to refer to the purpose of obtaining redress for injuries. The purpose of collecting administrative

costs is referred to simply by that description.

b. TO DETERMINE ACCURATELY WHETHER THE PURPOSE OF A STATUTE WAS TO PUNISH, NO RELIANCE SHOULD BE PLACED ON THAT SERIES OF CASES WHICH DID NOT FOCUS ON THE PURPOSE OF THE STATUTE BUT RATHER FOCUSED ON THE IMPORTANCE OF CONSTITUTIONAL PROTECTIONS NOT AT ISSUE IN THIS CASE.

It must not be overlooked that the inquiry into the punitive purpose of the sanction is not the only test which the courts have applied in determining whether constitutional provisions are called into play by certain statutes. As this Court noted in *Helvering v. Mitchell,* 303 U.S. 391, 400 n. 3 (1938):

> The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced.

The recognition that the Court has used different tests in determining the applicability of a constitutional provision is an important one because cases which focused on the procedural rule involved as opposed to the purpose of the sanction, in determining the applicability of a constitutional provision, are generally not relevant to an inquiry into the penal nature of a sanction.[13] The assumption cannot properly be made that

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[13]It is for this reason, and no other, that this Court's decisions which involved compelled testimony in "civil" proceedings, [*see, e.g., Boyd v. United States,* 116 U.S. 616 (1886); *Lees v. United States,* 150 U.S. 876 (1893); *United States v. United States Coin & Currency,* 401 U.S. 715 (1971)], are not particularly helpful in analyzing the case at bar. In *Boyd,* which was the seminal case, it is clear that what the Court was focusing on was the nature of the constitutional protection, namely the values of the Fifth Amendment privilege, and not the nature of the sanction. The nature of the sanction was never really addressed as such, but the Court clearly viewed it as "criminal." This view apparently came from the Court's observation, cited in the Government's Brief at 50-51, that the forfeiture imposed on Boyd could have been accomplished either by criminal indictment or civil proceeding — the inference being that the form of the

because a court held that a particular procedural rule required by the Constitution in criminal cases was not applicable in a proceeding to enforce a statutory sanction, based on its assessment of the importance of the procedural rule, the sanction which was being enforced was not punitive. Such a conclusion is simply beyond the pale of the courts' conclusions in those cases. *See, e.g., United States v. Regan,* 232 U.S. 37 (1914); *Hepner v. United States,* 213 U.S. 103 (1909); *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320 (1909). And since the focus of those cases was on the need to protect the values of constitutional provisions other than the Fifth Amendment,[14] those cases are not relevant to the case at bar in any way.

This distinction between those cases which truly focused on the purpose of the sanction and those which simply focused on the constitutional protection involved is often overlooked by the Government in its brief. For example, after arguing that Congress must be aware of both the procedural distinction between criminal and civil sanctions and "the vastly different

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proceeding alone should not determine the application of the privilege. The Government's attempt to distinguish *Boyd, Lees,* and *United States Coin & Currency* from the present proceeding is flawed by its failure to understand what the Court does and does not do in *Boyd. Boyd* does not say that the Fifth Amendment privilege only applies when "civil" penalties are imposed for *criminal* offenses. For the Government to take the position that *Boyd* is distinguishable from the present case because the violation of §311(b)(3) is not a crime is inconsistent with the rest of its brief. If the only relevant factor in determining whether the intent of a statute is punitive is whether or not the penalty is imposed for a *criminal* offense, then congressional labels decide the case. The Government obviously does not believe this is a controlling test or else it should have concluded that the only important *Mendoza-Martinez* factor was the one which focued on whether or not the behavior to which the sanction applied is a crime and ignored all the other factors.

[14]The values protected by the Fifth Amendment privilege have been much more heavily emphasized by this Court than the values underlying many other constitutional protections. The Fifth Amendment privilege against self-incrimination has been described as "one of the great landmarks in man's struggle to make himself civilized," *Ullman v. United States,* 350 U.S. 422 (1956) and as "the essential mainstay of our adversary system," *Miranda v. Arizona,* 384 U.S. 436, 460 (1966). Because of the importance of the privilege, it is a general rule that it is to be liberally construed.

legal and societal consequences," the Government continues:

> For this reason, as Judge Friendly stated, "[w]hen Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress as its word." *United States v. J.B. Williams Co.,* 498 F.2d 414, 421 (2d Cir. 1974). Gov't Brief at 28.

To the extent that the Government intends that this Court follow the analysis of Judge Friendly and conclude that because §311(b)(6) imposes a monetary "civil" penalty it is not criminal/punitive for purposes of the Fifth Amendment privilege, it is only necessary to cite portions of the court's opinion which follow the portion cited to show that that analysis is inapposite here.

> While Congress could not permissibly undermine constitutional protections simply by appending the "civil" label to traditionally criminal provisions, the statute here at issue is plainly not of that class. In the face of a long line of contrary authority, appellants have not directed our attention to any civil penalty provision that has been held sufficiently "criminal" in nature *to invoke the protections of the Sixth Amendment.* (emphasis added) (footnote omitted) *United States v. J. B. Williams Co.,* 498 F. 2d 414, 421 (2d Cir. 1974).

This is only one of many examples in the Government's brief of the inaccuracy and confusion which result from relying on cases which focused on the nature of the constitutional protection involved, in trying to determine whether or not the purpose of a sanction is punitive.

3. The Indicators Relevant to Determining Whether the Purpose of a Statute Is to Punish Are Statutory Language, Legislative History, Statutory Context, and the *Mendoza-Martinez* Factors.

In determining whether Congress' purpose in enacting a statute was to punish, the courts have examined a variety of indicators. The most direct indicators are statutory language, legislative history, and statutory context. When those have not been conclusive, the courts have turned to other less direct indicators such as the factors set forth by this Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168 (1963) [hereinafter referred to as "the *Mendoza-Martinez* factors"], set forth *infra* at 29.

B. APPLYING THE STANDARD JUDICIAL INQUIRY USED IN DETERMINING THE PENAL NATURE OF A STATUTE TO THE FACTS OF THE CASE.

A congressional intent to punish those individuals and companies who discharge oil into navigable waters by the imposition of the §311(b)(6) penalty is clearly reflected in the statutory language and context of §311(b)(6), the legislative history of penalties similar to §311(b)(6) and the conclusion dictated by the proper application of the *Mendoza-Martinez* factors.

1. The Language of §311(b)(6) Indicates a Punitive Intent.

It is significant that the monetary exaction provided for by §311(b)(6) is labeled by Congress as a penalty.[15] The standard

[15]It is interesting to note that many of the statutes imposing monetary sanctions which the courts have been asked to review to determine whether or not they were penal in nature have been neutral on their face, using terms like "sums," "damages," or "taxes." *See Rex Trailer Co. v. United States,* 350 U.S. 148, 148 n.1 (1956) ("shall pay . . . the sum . . . ."); *Helvering v. Mitchell,* 303 U.S. 391, 395 (1938) ("50 per centum of the total amount of the deficiency . . . shall be so assessed, collected and paid . . . ."); *United States v. Constantine,* 296 U.S. 287, 289 n.1 (1935) ("a special excise tax"); *Lipke v. Lederer,* 259 U.S. 557, 561 (1922) ("a tax shall be assessed"); *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20, 35 (1922) ("shall pay . . . in addition to all other taxes . . . an excise tax . . . ."); *Lees v. United States,* 150 U.S. 476, 478 (1893) ("for every violation, the offender shall forfeit and pay for every such offense . . . ."); *Stockwell v. United States,* 13 Wall. 531, 533 (1871) ("pay a sum double the amount or value of the goods . . . ."). The affirmative disability or restraint cases also involved statutes which were neutral on their face. *See, e.g.,* cases cited in section II(B)(4)(e), *infra* at 36.

definition of "penalty" is: "A punishment; a punishment imposed by statute as a consequence of a commission of an offense. Also money recoverable by virtue of a statute imposing a payment by way of punishment." Black's Law Dictionary 1020 (5th ed. 1979). *See also United States v. La Franca,* 282 U.S. 568, 573 (1931); *United States v. Chouteau,* 102 U.S. 603, 611 (1880). The §311(b)(6) penalty is a monetary exaction levied as a consequence of the commission of an offense,[16] namely the prohibited discharge of oil into navigable waters, and the fact that Congress called it a penalty suggests that Congress' purpose was to punish such offenses. For, to borrow the Government's logic, it must be presumed that Congress *knew* that the term "penalty" meant punishment and used it advisedly. Gov't Brief at 27-28. Moreover, if Congress' true purpose in enacting the §311(b)(6) penalty was to obtain compensation for damages to navigable waters or indemnity for administrative costs, it seems that Congress would have used a much more descriptive label such as "liquidated damages" or "fees and costs" to describe the monetary exaction.

The fact that the word "civil" describes the word "penalty" does not deny the existence of a punitive intent. The word "civil" is ambiguous with respect to a punitive vs. nonpunitive meaning. *See* section II(A)(2)(a) *supra* at 14. Congress' use of the term "civil" may simply reflect Congress' intent that the penalty be assessable by an administrative agency and be collectable through a civil proceeding, without reflecting anything about Congress' *purpose* in imposing the penalty. *See,e.g., Hepner v. United States,* 213 U.S. 103 (1909); *Oceanic Steam Navigation Co. v. Stranahan,* 214 U.S. 320 (1909); and *Boyd v. United States,* 116 U.S. 616 (1886). *See also* section II(A)(2)(b) *supra* at 19.

On balance, it is the word "penalty" which indicates a punitive intent, whether or not it is modified by the word "civil," which most clearly reflects Congress' purpose.

[16]Section §311(b)(6) specifically describes the violation of §311(b)(3) as an "offense." *See* note 4, *supra* at 3 .

2. The Legislative History of Statutory Sections Which Are Similar to §311(b)(6) Indicates a Punitive Intent.

There does not appear to be any legislative history specifically addressed to §311(b)(6). However, §§311(b)(2)(B)(ii) and 311(b)(2)(B)(iii) (Pet. App. at 38a-39a) also impose civil penalties[17] which the Government finds analogous to the penalty imposed by §311(b)(6). Gov't Brief at 24 n.18. The legislative history of these sections would appear applicable to §311(b)(6). *See United States v. Eureka Pipeline Co.*, 401 F. Supp. 934, 939 (N.D. W.Va. 1975).

The Senate committee which considered the 1972 amendments to the Federal Water Pollution Control Act described the purpose of §§311(b)(2)(B)(ii) and 311(b)(2)(B)(iii) as follows:

> The committee believes that the discharge of such substances should be subject to penalty even though cleanup is not practicable. In this way, each carrier or handler evaluates the risk of discharge and determines whether or not the potential penalty is worth the risk. Pub. L. No. 92-500, Section 311, *reprinted in* [1972] U.S. Code Cong. & Ad. News 3732.

Clearly the committee hoped that the existence of the penalty provision would deter carriers and handlers not just from intentionally discharging such substances and from conducting their business in a negligent manner, but also from operating their business in less than a completely careful way. There can be little doubt that the purpose of §311(b)(6), like the purpose of §§311(b)(2)(B)(ii) and 311(b)(2)(B)(iii), is to deter that conduct which results in oil spills.

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[17]In light of the Government's certainty that Congress used the word "civil" advisedly to describe the §311(b)(6) penalty (Gov't Brief at 27, 28), it is interesting to note that the §311(b)(2)(B)(ii) penalty is described as a "civil penalty" while the §311(b)(2)(B)(iii) penalty is described simply as a "penalty." A reading of §311(b)(2)(B)(ii) and §311(b)(2)(B)(iii) does not reveal any difference in the purposes of the penalties.

It seems almost axiomatic that the only ways a government can directly affect whether or not a person takes a certain action are to reward desirable actions and to punish prohibited ones. Since Congress' objective in enacting §311(b)(6) was to deter persons from spilling oil, it seems unquestionable that Congress intended that the penalty operate *as a punishment* on those persons who might spill oil. That is punitive intent.

3. The Statutory and Administrative Factors on Which the §311(b)(6) Penalty Is Assessed Indicate a Punitive Intent.

The different statutory and administrative factors on which assessment of the §311(b)(6) penalty is based also indicate, both directly and indirectly, that Congress' intent was punitive. These factors are consistent with a punitive purpose, and they are, by and large, inconsistent with all of the suggested nonpunitive purposes.

Section §311(b)(6) directs the Secretary to consider the following factors in assessing the penalty "[T]he appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." Instruction 5922.11B, issued by the Commandant of the Coast Guard on October 10, 1974, expounds on the statutory factors.[18] Section C of that instruction lists the factors to be considered in determining the

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[18]The amici are responsible for the fact that the Tenth Circuit Court of Appeals relied on Coast Guard Instruction 5922.11A, rather than Coast Guard Instruction 5922.11B. Since the parties had not cited any Coast Guard instructions and the amici felt they were important, the amici set out, in their brief, Coast Guard Instruction 5922.11A which had been attached as the appendix to *United States v. LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976). Although in oral argument the amici brought the Instruction to the court's attention and it was the subject of numerous inquiries by the court, the Government did not at that time, or subsequent to the argument, bring the Instruction actually in effect at the time of the case to the court's attention. As the Government noted, the differences between the instructions are largely matters of form. Gov't Brief at 11 n.8.

gravity of the violation:

(1) Was the discharge intentional?
(2) Could the discharge have been prevented using reasonable care?
(3) Was the discharge caused by an act or omission of a type previously attributable (according to official records) to that same owner/operator so as to place him on notice of the particular hazard?
(4) Was the cause of the discharge a violation of the prevention regulations? Note that a *separate* violation may have occurred under Section 311(j).
(5) Did the owner/operator take special steps to try to avert the specific discharge?
(6) Was the discharge "unforseeable" [sic] by an experienced owner/owner [sic] knowing the weather, sea conditions and equipment?
(7) Was there a minimum amount of oil discharged? Gov't Brief at 2a, 3a.

Taken all together, these factors indicate an intent to punish rather than a congressional intent to recover compensation for irremediable damages to navigable waters or to recover the administrative costs placed on the system by the oil spill as suggested by the Government. Gov't Brief at 33, 40, 45, 46.

The two purposes of punishment are deterrence and retribution. Consideration of the appropriateness of a penalty to the size of the business and the effect of the penalty on the business's finances appears relevant to deterrence in the following way. The Coast Guard is the judge and jury in assessing the penalty. Congress has simply given the Coast Guard the latitude to assess a penalty which is sizable enough to have a deterrent impact on each particular violator but not large enough to drive any particular company out of business. Although Section D of Coast Guard Instruction 5922.11B indicates that the basic objective in considering the size of the business is to avoid bankrupting the violator (Gov't Brief at 4a), the "relative deterrence" thinking outlined above is not absent from the Coast Guard Instruction. Section E states:

> If the facts warrant the imposition of a minimum penalty, then the penalty should be reasonably sufficient to motivate owners and operators of vessels and facilities to take adequate measures to prevent future unlawful discharges. In a district where pollution incidents are somewhat controlled, a figure of $150.00 per incident might be adequate to provide the necessary motivation. In another district where violations are flagrant and preventative measures frequently disregarded, a somewhat higher minimum figure might be required to provide the same motivation. Gov't Brief at 5a.

The "gravity of the violation" factor, especially as the Coast Guard defines it, would seem particularly critical to deterrence. The Coast Guard assesses the facts of each case in an effort to determine whether the spill occurred as a result of the intentional conduct, the negligent conduct, or simply the less than totally careful conduct of the owner/operator. The penalty is scaled upwards the more responsible the owner/operator is for the occurrence of the spill. Consideration of the gravity of the spill reflects the adage that the punishment should fit the crime, with flagrant intentional violations being punished more severely than negligent or other violations. The keying of the size of the penalty to the intentional conduct of the violator also indicates a retributive purpose in punishing more harshly those who flagrantly violate the law. All the factors on which the penalty is assessed are perfectly consistent with a punitive purpose.

The analysis of the assessment factors in light of the alternate purposes suggested for the penalty, specifically compensation to the government for irremediable damages to navigable waters or compensation for administrative costs, shows that the factors are much less reasonably related to those purposes than to a punitive purpose. It would seem that neither the size of the business nor the effect of the penalty on the business is relevant to determining the amount of irremediable damage to navigable waters or the administrative costs of investigating a violation in any particular case. At best, these factors are neutral, showing that Congress did not intend §311(b)(6) to bankrupt anyone.

The determination of the gravity of the violation, according to the Coast Guard's criteria, also does not relate strongly to either of these two compensatory purposes. It does not seem necessary to determine the motivation of the violator in order to determine the extent of the irremediable harm suffered by the government. The only factor which the Coast Guard considers which might be relevant to irremediable harm is factor number (7). Notably, however, that consideration is specifically limited to the question of whether there was a "minimum amount" of oil discharged. Moreover, any cleanup efforts undertaken by the violator, which would seem to be relevant to the question of how much of the damage suffered by the government was irremediable, is specifically excluded from consideration. Pet. App. at 2a

Similarly, the gravity of the violation, as determined by the Coast Guard, would not appear to relate to the administrative costs placed on the government by a particular spill. Likewise, the fact that the penalty funds are used, in small part, to cover administrative costs does not convincingly indicate that this was the main reason the funds were collected in the first instance. If the government's primary purpose was to shift the burden of cleaning up water pollution from the public to industry, it could have done so much more easily and fairly by placing an occupation or special tax on all members of the industry. This suggests that recovering administrative costs was, at most, a secondary purpose to deterrence.

The relationship (or lack thereof) between the assessment factors and a congressional purpose should not be casually disregarded. While the courts may be free to assume that it was administrative convenience which dictated the establishment of a statutorily fixed sum to cover damages not easily assessed and to cover administrative costs, *see, e.g., One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972), when Congress and the administrative agency actually provide for a different penalty to be assessed in each instance, based on specific factors, those factors must be perceived as indicating why Congress imposed the penalty in the first place. The factors on which the §311(b)(6) penalty is based indicate a punitive purpose.

4. The Application of the *Mendoza-Martinez* Factors to the Facts of the Present Case Indicates a Punitive Intent.

In *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), the Court set out a list summarizing those factors which it had previously used in different cases "to determine whether an act of Congress is penal or regulatory in character." [19] Those factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. *Id.* at 168. (footnotes omitted)

The *Mendoza-Martinez* factors can be useful indicators of congressional intent when more direct indicators are inconclusive, as long as they are thoughtfully applied and are not applied in a mechanical fashion simply to reach a conclusion.

Because a number of lower courts have addressed the question of Congress' intent in enacting §311(b)(6) and have applied the *Mendoza-Martinez* factors, this provides a unique opportunity to compare how different courts have applied the same analysis to the same facts. *See Ward v. Coleman,* 598 F.2d 1187 (10th Cir. 1979); *United States v. General Motors Corp.,* 403 F. Supp. 1151 (D. Conn. 1975); *United States v.*

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[19]The "regulatory" character of an act refers only to those true nonpunitive regulatory purposes associated with affirmative disabilities or restraints, namely the regulatory purpose of setting standards for the enjoyment of privileges or franchises. *See* section II(B)(4)(e), *infra* at 36.

LeBeouf Bros. Towing Co., 377 F. Supp. 558 (E.D. La. 1974); *Ward v. Coleman*, 423 F. Supp. 1352 (W.D. Okla. 1976); *United States v. Eureka Pipeline Co.*, 401 F. Supp. 934 (N.D. W. Va. 1975) [hereinafter "the §311(b)(6) cases"]. To facilitate the comparison of the §311(b)(6) cases, the amici have prepared an appendix to this brief [hereinafter "Amici App."] which sets out, in columns, each court's application of the *Mendoza-Martinez* factors to the facts of the case, the inferences drawn by each court from its factual conclusions, and the reasoning each court used to justify its inferences. The Government's brief is similarly analyzed and presented in the Appendix.

The Appendix reveals a number of interesting insights into the nature of the *Mendoza-Martinez* factors and their application. In each of the §311(b)(6) cases, the court's stated objective was generally to determine whether or not Congress' intent in enacting §311(b)(6) was or was not punitive. It would seem that if the courts were all trying to determine the congressional intent behind §311(b)(6) they should all have come to the same conclusion. After all, Congress' intent was either punitive or it was not. But instead, the courts' final conclusions differed widely. Two courts concluded that Congress' intent was "civil" and "remedial." *See* Amici App., *United States v. General Motors Corp.*, and *Ward v. Coleman* (W.D. Okla.). Two courts concluded that Congress' intent was "punitive" or "criminal." *See* Amici App., *United States v. LeBeouf Bros. Towing Co.*, and *Ward v. Coleman* (10th Cir.). And one court found that the *Mendoza-Martinez* indicators were inconclusive in showing the congressional intent behind §311(b)(6). *See* Amici App., *United States v. Eureka Pipeline Co.* The best explanation for the inconsistency is that regardless of what the courts said they were doing, they were not limiting their inquiry simply to determining Congress' intent in enacting §311(b)(6). What they were really doing was deciding whether or not the §311(b)(6) penalty was "criminal" or "civil" for the purpose of applying the constitutional protection in the case before them.

Since the determination of Congress' intent in enacting §311(b)(6) is a matter of statutory construction, it should be

determinable without regard to the constitutional protection involved in each case. However, it clearly appears that each court's assessment of the importance of the constitutional protection at stake influenced its application of the *Mendoza-Martinez* factors. Both of the courts which found that Congress' intent was punitive did so in the context of the Fifth Amendment privilege against self-incrimination. *United States v. LeBeouf Bros. Towing Co.*, *supra* and *Ward v. Coleman* (10th Cir.), *supra*. (*LeBeouf Bros. Towing Co.* was later reversed because the court overlooked the fact that corporations are not entitled to the Fifth Amendment privilege.) The court which found that the factors were inconclusive in showing congressional intent and one of the two courts which found Congress' intent to be remedial did so in the context of procedural due process clause protections. The only decision which was not affected as one might have anticipated, by the fact that the Fifth Amendment privilege was involved, was the Oklahoma district court's decision in *Ward v. Coleman supra*. However, a review of that decision indicates that, unlike the Tenth Circuit in *Ward* and the court in *United States v. LeBeouf Bros. Towing Co.*, the Oklahoma court took a straight statutory construction approach to §311(b)(6) with little if any thought to the values or applicability of the Fifth Amendment privilege.[20]

The conclusion that the constitutional protections at stake significantly influence the courts' inquiry into Congress' purpose in enacting §311(b)(6) should not be surprising. After all, at times this Court has focused solely on the nature of the constitutional protection involved as opposed to the purpose of the sanction applied. *See* section II(B)(2)(b), *supra* at 19. The problem which arises from combining the two analyses is that although the courts have properly considered the values of the constitutional protections at stake and have probably reached the correct conclusions (except for the district court's decision in *Ward*), their analyses are often misleading because

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[20]It seems significant that Judge Eubanks unconditionally denied Ward's Motion to Convene a Three Judge Court, despite the Fifth Amendment privilege arguments raised by Ward, on the grounds that "no substantial challenge to the constitutionality of the statute was presented." Appendix at 2, 3. Pet. App. at 23a n.2.

they are framed simply in terms of determining the congressional intent behind §311(b)(6), while, in reality, they weigh the importance of the constitutional protection involved. Therefore, any use of the §311(b)(6) cases in the case at bar must be undertaken with this recognition of how the courts were actually analyzing the problem.

Several other general conclusions can be drawn from the Appendix. An overview of the "application" column shows that there is often disagreement among the courts even with respect to the application of the factors to the facts. The courts are unanimous only with respect to the application of factors 2, 3, 4 and 5, concluding that monetary penalties have historically been regarded as punishment, that the §311(b)(6) penalty comes into play only on a finding of scienter, that the §311(b)(6) penalty promotes deterrence, and that the behavior to which the penalty applies is already a crime. The lack of unanimity with respect to factor 1, the question of whether a monetary penalty is an affirmative disability, stems from the fact that some courts failed to understand the nature of an affirmative disability or restraint. The lack of unanimity in the application of factors 6 and 7, whether alternative purposes could be rationally assigned to the §311(b)(6) penalty and whether the amount of the penalty was excessive in relationship to such purposes, appears to stem from the fact that the decisions as to whether a purpose is "rationally related" and whether an amount is "excessive" involve value judgments which are affected by the subliminal weighing of the values of the constitutional protections.

A review of the "inference" column reveals that the inferences, even when drawn from the same factual applications, vary widely. The "reasoning" column often indicates why these differences exist, reflecting frequently imprecise uses of terms like "civil" and "remedial," and reflecting analyses which are not properly directed toward answering the question posed by the factual application. Often too, the variety of inferences drawn reflects the influence of each court's perception of the importance of the constitutional protection at stake. Finally, the Appendix clearly demonstrates that the *Mendoza-Martinez* factors can

be argued as showing almost any purpose. It is especially interesting that the Government manages to allege that certain factors indicate a remedial purpose even when none or few of the §311(b)(6) cases provide support for such an allegation.

Having generally criticized, analyzed, and reworked all the other applications of the *Mendoza-Martinez* factors to the §311(b)(6) penalty, the amici offer their own analysis of their application and the proper inferences to be drawn from them. In order to clarify the application of the *Mendoza-Martinez* factors, which appear to be listed randomly, the amici have found it helpful to group the factors according to whether they are more useful in indicating punitive or regulatory intent. Four of the seven *Mendoza-Martinez* factors are particularly relevant to the question of whether the intent is punitive or not; namely, whether the sanction has historically been regarded as a punishment, whether the sanction comes into play only on a finding of scienter, whether its operations will promote the traditional aims of punishment — retribution and deterrence, and whether the behavior to which it applies is already a crime. A "yes" answer to these factors indicates a punitive intent, in most cases, but some "yes" answers are inconclusive. A "no" answer may discredit the conclusion that the intent is punitive or may be virtually inconclusive. However, even though a "no" answer may strongly discredit punitive intent, it cannot be logically taken, in most cases, to indicate the existence of a compensatory or other nonpunitive intent.

The remaining three factors tend to be much more useful in either proving or disproving a nonpunitive intent; namely, whether the sanction involves an affirmative disability or restraint, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternate purpose assigned. With respect to these factors, a "yes" answer tends to indicate a nonpunitive intent. A "no" answer may discredit such a conclusion or be virtually inconclusive. Again, it cannot be assumed that a "no" answer to these factors indicates a punitive intent. Seldom, if ever, is the determination of any of the *Mendoza-Martinez* factors dispositive of the punitive-

nonpunitive inquiry.

a. THE FACT THAT A MONETARY PENALTY HAS HISTORICALLY BEEN REGARDED AS A PUNISHMENT IS AN INCONCLUSIVE INDICATOR.

The collection of a monetary penalty has historically been regarded as a punishment. However, the significance of this conclusion in indicating punitive intent is diminished by the fact that sums of money may be collected as damages, fees and costs, or taxes. Therefore, while a "no" answer to this factor would tend significantly to discredit the conclusion that the intent was punitive, a "yes" answer is generally inconclusive.

Comparing the §311(b)(6) cases (Amici App. column 2), the courts were unanimous in recognizing that a monetary penalty has historically been regarded as a punishment, but that because of its other possible purposes it is an inconclusive indicator. Only the Government, in its brief, argues that the fact that a monetary penalty is involved "clearly supports the remedial, noncriminal nature of the penalty provision." Gov't Brief at 37.

b. THE FACT THAT THE PENALTY OPERATES TO PROMOTE RETRIBUTION AND DETERRENCE CONFIRMS A PUNITIVE INTENT.

This factor focuses on whether the penalty actually promotes retribution and deterrence. Undoubtably it does, but the much more important fact is that direct indicators such as the legislative history and the assessment factors clearly show that Congress specifically *intended* that the penalty operate to promote deterrence. *See also* unanimity of §311(b)(6) cases and the Government on deterrent intent, Amici App. column 4.

The distinction between determining that a sanction operates to promote deterrence and determining that it was deliberately imposed for the purpose of promoting deterrence is important in the following way. If Congress' main purpose in enacting §311(b)(6) could somehow be shown to be to obtain compensation for irremediable inquiries to navigable waters, then any deterrent effect which the penalty might have could be discounted as incidental. But the fact that Congress' most important goal in the FWPCA was deterrence indicates that Congress' primary concern was with the impact that the penalty would have on the conduct of those subject to it and

not with the incidental monetary benefit to itself. This demonstrates a punitive purpose.

c. THE FACT THAT THE BEHAVIOR TO WHICH THE §311(b)(6) PENALTY APPLIES IS A CRIME INDICATES A PUNITIVE INTENT.

The discharge of oil from the shore into navigable waters is a crime under the Rivers and Harbors Act of 1899, 33 U.S.C. §§407, 411 (1976). *See* Amici App. column 5. The same conduct is also a violation of the §311(b)(3) prohibition, showing the lack of any intrinsic distinction between a "crime" and a regulatory "offense" in this case. Any distinction is simply one of labels. What Congress appears to have done in the FWPCA is to bar the use of the §311(b)(5) compelled report in "criminal cases," presumably those arising under the Rivers and Harbors Act, in order to avoid obvious constitutional problems. Then Congress turned right around and reenacted the Rivers and Harbors Act prohibition as §311(b)(3) of the FWPCA, making the same conduct again subject to penalty under §311(b)(6) but calling it a "civil" penalty so that the compelled reports could be used as the basis for assessing it.

While it is true that the §311(b)(6) penalty does not appear to be an *additional* punishment for a crime, the §311(b)(6) penalty does appear to be a substitute punishment for that offense. A "yes" answer to this factor weighs in favor of the conclusion that Congress' intent was punitive.

d. THE FACT THAT THERE IS NO SCIENTER REQUIREMENT FOR THE IMPOSITION OF THE §311(b)(6) PENALTY DOES NOT DISPROVE A PUNITIVE INTENT AND THE FACT THAT A SCIENTER REQUIREMENT IS INTRODUCED BY THE COAST GUARD IN ASSESSING THE PENALTY INDICATES A PUNITIVE INTENT.

The §311(b)(6) penalty is imposed on a strict liability basis. But the absence of a scienter requirement does not disprove the existence of a punitive intent since crimes too may be punished on a strict liability basis. As the Tenth Circuit Court of Appeals noted, the discharge of oil into navigable waters is a strict liability crime under the Rivers and Harbors Act. The absence of a scienter requirement simply shows that the punishment was intended to deter not just intentional or negligent conduct, but also to deter conduct which was less

than completely careful.

In assessing the amount of the penalty, the Coast Guard introduces a scienter requirement by considering whether the spill was intentional or accidental. Gov't Brief at 2a, 3a. Higher penalties are assessed for more flagrant violations, indicating a retributive and deterrent purpose.

Viewed as a whole, the punitive intent indicators support the conclusion that Congress' intent in enacting the §311(b)(6) penalty was to punish those individuals and companies who violated §311(b)(3) by discharging oil into navigable waters. No alternative nonpunitive purpose is shown by the following three nonpunitive intent indicators.

e. THE FACT THAT A MONETARY PENALTY IS NOT AN AFFIRMATIVE DISABILITY OR RESTRAINT CLEARLY DISPROVES A NONPUNITIVE REGULATORY INTENT.

Oddly enough, there seems to be considerable confusion about what an affirmative disability or restraint is and whether or not a monetary penalty is one. *See* Amici App. column 1, Application. *See, e.g., United States v. Eureka Pipeline Co.,* 401 F. Supp. 934, 939 (N.D. W.Va. 1975); *United States v. Futura,* 337 F. Supp. 162 (N.D. Fla. 1972). As the Court used the term in *Kennedy v. Mendoza-Martinez, supra,* an "affirmative disability or restraint" is the "taking away" from an individual some privilege to which he had previously been entitled or some status which he had previously held. Affirmative disabilities would include restrictions on the right to vote, *Murphy v. Ramsey,* 114 U.S. 15 (1885); restrictions on the right to practice a certain occupation, *Spevak v. Klein,* 385 U.S. 511 (1967) (disbarment of attorney); *United States v. Lovett,* 328 U.S. 303 (1946) (exclusion from government service); *Hawker v. New York,* 170 U.S. 189 (1898) (exclusion from practice of medicine); *Cummings v. Missouri,* 71 U.S. 277 (1866) (disability to conduct religious services); and restrictions on entitlement to government largess, *Flemming v. Nestor,* 363 U.S. 603 (1960). It seems obvious that the imposition of a monetary penalty does not involve the taking away of any privilege or status. Therefore the sanction involved in the present case is not an affirmative disability.

If a monetary penalty is a restraint at all, it is, as the Tenth Circuit Court has found, a negative as opposed to an affirmative restraint and it is a restraint only on the theory that a penalty will deter the objectionable conduct. *See Atlas Roofing Co. v. Occupational Safety & Health Review Commission,* 518 F.2d 990, 1001 (5th Cir. 1975). Although the Government properly analyzes what an affirmative disability is, it then proceeds to draw a completely incorrect conclusion from the absence of an affirmative disability in this case. The Government concludes that such absence distinctly points to a remedial as opposed to a punitive intent. Gov't Brief at 35, 37. At best, the absence of an affirmative disability is inconclusive in proving or disproving punitive intent. *See* Amici App. column 1, Inference.

The significance of this factor is that a "no" answer disproves, almost by definition, the kind of nonpunitive regulatory purpose which was contemplated by the Court in *Mendoza-Martinez. See Helvering v. Mitchell,* 303 U.S. 391, 399 (1938). This is true because *only* with an affirmative disability can it be shown that the government is seeking to regulate *something other than* the conduct allegedly being punished.

This conclusion can be demonstrated by examining the kind of analysis that the Court utilized in determining whether an affirmative disability or restraint could be justified by a nonpunitive regulatory purpose. As the Court stated in *Trop v. Dulles,* 356 U.S. 86, 96 (1957):

> The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But, because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, the law is sustained as a nonpenal exercise of the power to regulate the franchise.

If a disability is imposed on a person in order to protect a

privilege or franchise, then the restriction is regulatory. *See Mahler v. Eby,* 264 U.S. 32 (1924). The logic on which this conclusion is based is that the government has a right to set standards for the enjoyment of governmental privileges. If in establishing standards for a privilege — for example, the right to vote, or the right to practice law — the government excludes certain classes of people, especially persons who have committed some offense or other, it could be argued that such exclusion is necessary, not to punish those who are deprived of the privilege, but instead to protect that privilege from enjoyment by those who are unworthy of it. Furthermore, by establishing standards for the exercise of a privilege, the government protects the public from an exercise of the privilege by those whose fitness might be questionable. *See Mahler v. Eby, supra* at 39; *Hawker v. New York,* 170 U.S. 189, 196 (1898).

However, if an affirmative disability or restraint is imposed in order to punish (regulate) specific conduct, then it is punitive and not regulatory in the sense that the word "regulatory" is used in this factor. It must be understood, in comparing an affirmative disability with a monetary penalty, that a monetary penalty cannot ever be characterized as a "reasonable ground of eligibility" for a privilege and can only regulate by punishing specific conduct.

That an affirmative disability may have a regulatory purpose unconnected with specific conduct, whereas a monetary penalty cannot, is illustrated by the relationship between the disability or the penalty and the conduct allegedly being punished. A specific nonpunitive affirmative disability usually comes into play in connection with a wide variety of conduct. For example, a lawyer can be disbarred for any number of criminal activities, as long as they are felonies. In contrast, a specific monetary penalty applies to specific conduct. In the same vein, an affirmative disability does not always come into play when a certain action is taken. If both a lawyer and a nonlawyer commit felonies, the affirmative disability only applies to the lawyer. But a monetary penalty is exacted whenever the prohibited act occurs, regardless of who commits it. A monetary penalty when used to regulate is

clearly punishment for specific conduct.

In the present circumstance, the absence of an affirmative restraint disproves a nonpunitive regulatory purpose and is inconclusive with respect to a punitive purpose. The Government, in concluding that the absence of an affirmative disability or restraint signifies a remedial purpose, completely fails to recognize what this *Mendoza-Martinez* factor was intended to indicate.

f. ALTHOUGH ALTERNATE PURPOSES FOR THE §311(B)(6) PENALTY ARE CONCEIVABLE, THEY ARE NOT RATIONALLY RELATED TO IT, WHICH DISPROVES A NONPUNITIVE PURPOSE.

Undoubtedly, alternate nonpunitive purposes can be assigned to any monetary penalty by courts and lawyers. However, the focus of the *Mendoza-Martinez* factors and of the Court's inquiry in this case is not whether a particular sanction *could have been used* to achieve nonpunitive purposes, but instead whether Congress *intended* that it be used for those nonpunitive purposes. As this Court observed in *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 542 (1943): "Sound rules of statutory interpretation exist to discover and not to direct the Congressional will." The requirement that the alternate purpose must be rationally connected to the penalty is important, especially in a case involving values as essential as those underlying the privilege against self-incrimination. It is not enough to find a nonpunitive purpose for a monetary penalty and make a plausible argument for it. It must be shown that the nonpunitive purpose advanced was actually the primary purpose intended by Congress.

First, to the extent that the Government is claiming a regulatory purpose of deterring the prohibited conduct of discharging oil into navigable waters, the Government has failed to demonstrate any mechanism, other than punishment, by which the Act could operate to promote such deterrence. Therefore, this argument does not prove a nonpunitive intent.

Second, the Government has failed to demonstrate any congressional intent that the §311(b)(6) penalty act as a measure of liquidated damages. The monetary assessment is defined as a penalty and not as liquidated damages. The

legislative history stresses deterrence, not compensation to the government, as the penalty's primary purpose. If the purpose of the penalty was simply to make the government whole for the oil spill, there should be no consideration of how the spill occurred or the intent of the violator, since those questions have no bearing at all on the degree of harm to the government and are inconsistent with the concept of absolute liability.

Finally, the Government has failed to show that the primary purpose of the §311(b)(6) penalty was to finance the costs of administering the FWPCA. Neither the language, statutory context, or legislative history support this conclusion. The fact that the funds collected from the penalty are placed in a revolving fund used to pay administrative costs and the costs of cleaning up spills when no responsible entity can be identified, cannot sustain the conclusion that such was the primary purpose for which the funds were collected in the first instance.

g. THE FACT THAT THE AMOUNT OF THE §311(B)(6) PENALTY IS ASSESSED ON THE BASIS OF FACTORS NOT REASONABLY RELATED TO THE SUGGESTED NONPUNITIVE PURPOSE DISPROVES A NONPUNITIVE INTENT.

Determining whether the penalty is "excessive" in relation to a suggested nonpunitive purpose requires a value judgment. It requires a court to determine the degree of disparity it will tolerate between the amount of money it views as necessary to satisfy the nonpunitive purpose and the amount of the penalty. In the present case, it would be possible for a court to determine that a penalty which has a maximum of $5,000.00 could never be excessive in relation to irremediable damages or administrative costs.

In order for this factor to be of somewhat more utility, it is helpful to reframe the factor, as this Court did in *Bell v. Wolfish*, 99 S. Ct. 1861, 1874 (1979), in terms of whether the amount of the penalty is "reasonably related" to the alternate purpose. Although the penalty imposed in a particular case might be reasonably related to a nonpunitive purpose, such as compensating the government for the irremediable effects of an oil spill or reimbursing the government for administrative costs, such reasonable relationship exists by accident and not

by design, since the assessment factors are not related to the suggested nonpunitive purposes. *See* section II(B)(3) *supra* at 25. It is just as likely that no reasonable relationship would exist. This tends to disprove the existence of the suggested nonpunitive purposes.

The *Mendoza-Martinez* factors which indicate a nonpunitive intent, taken collectively, fail to prove any nonpunitive purpose for the §311(b)(6) penalty. This conclusion, as well as the conclusions reached in examining the statutory language and context and the legislative history and the *Mendoza-Martinez* factors indicating punitive intent, demonstrates that the congressional intent in enacting §311(b)(6) was punitive.

III. EVEN IF THE COURT DOES NOT FIND THAT THE INDICATORS CONCLUSIVELY PROVE THAT CONGRESS' INTENT IN ENACTING §311(b)(6) WAS PUNITIVE, THE PRINCIPLE ESTABLISHED BY THIS COURT IN THE SELF-REPORTING CASES DICTATES THAT THE PRIVILEGE STILL BE GIVEN EFFECT IN THIS CASE.

It is at the conclusion of the standard judicial inquiry into the purposes of the penalty, and not before, that account should be taken of the nature of the constitutional protection involved. The standard judicial inquiry into the purpose of the §311(b)(6) penalty may yield one of three results: 1) Congress' purpose may be conclusively proved to be nonpunitive; 2) Congress' purpose may be conclusively proved to be punitive; or 3) the inquiry might produce, in varying degrees, an inconclusive result. In most cases, if the purpose of the penalty is unquestionably proven to be nonpunitive, the inquiry ends. *But see* amici's analysis of that potentiality occurring in the present case, section I, *supra* at 8. If the purpose of the penalty is clearly shown to be punitive, then at least for the purposes of the application of the Fifth Amendment privilege, the inquiry should end.[21] This was the

[21]For the purpose of other constitutional protections such as the procedural due process clause protections the inquiry might continue at

conclusion of the Tenth Circuit Court of Appeals in this case. But if this Court feels that the inquiry is not completely conclusive, then it is the principles dictated by the constitutional protection at stake which determine the outcome of the case.

When the facts of any case are inconclusive, it is the assignment of the burden of proof which ultimately determines the case. Therefore, the rule which determines where the burden of proof should lie must be carefully chosen and applied. The rules of construction adopted by those lower courts examining statutes in a due process or a statutory construction context, which permit congressional labels to resolve an inconclusive inquiry, are not appropriate in a Fifth Amendment privilege context.[22] The selection of an appropriate burden of proof rule should take into account the importance of the competing values. In this case, such a rule must take cognizance of the importance of the Fifth Amendment privilege against self-incrimination and the importance of the governmental interests involved. Guidance in balancing these two competing interests can be found in this Court's decisions which analyzed other self-reporting requirements in light of the Fifth Amendment privilege against self-incrimination. *See, e.g., California v. Byers,* 402 U.S. 424 (1971); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *United States v. Sullivan,* 274 U.S. 259 (1927) ("the self-reporting cases").

A. THE SELF-REPORTING CASES ESTABLISHED THE PRINCIPLE THAT UNCERTAINTIES SHOULD, IN

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this point to determine whether the penalty was *sufficiently* punitive to demand the recognition of those protections.

[22]For example, in *United States v. Eureka Pipeline Co.,* 401 F. Supp. 934 (N.D. W. Va. 1975), the District Court for the Northern District of West Virginia chose to resolve doubts against finding that the penalty was punitive in nature on the basis that: "[U]nmistakable evidence of punitive intent is required before a congressional enactment of this kind may be struck down." *See also Atlas Roofing Co. v. Occupational Safety & Health Review Comm.,* 518 F.2d 990, 1011 (5th Cir. 1975); *United States v. J.B. Williams Co.,* 498 F.2d 411, 421 (2d Cir. 1974).

MOST INSTANCES, BE CONSTRUED IN FAVOR OF THE APPLICATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

In the self-reporting cases, usually four of the five elements[23] necessary for the application of the Fifth Amendment privilege were unquestionably present. Typically, the facts of those cases indicated that a natural person was involved, evidence was compelled, the compelled evidence was testimonial in nature, and the sanction which might be imposed was unquestionably criminal. Therefore, the question which remained for the Court to resolve was the likelihood that the compelled evidence would lead to the criminal penalty.

The case at bar presents almost the same scenario, except that, in this case, the compelled evidence is unquestionably incriminating since the §311(b)(5) report is *designed* to lead to the imposition of the §311(b)(6) sanction, and the remaining issue is the likelihood that the §311(b)(6) penalty is punitive in nature. In the present instance, as in the self-reporting cases, the Court must deal with the question of how likely it is that a certain element necessary for the application of the privilege is present. Therefore, the same rules which were used in the self-reporting cases to resolve doubts as to whether the compelled evidence was "incriminating" are similarly applicable to this case in resolving doubts as to whether the congressional intent behind the penalty was punitive or not.

In the self-reporting cases, when the facts were not conclusive, the Court weighed the competing interests in determining whether the privilege should apply, with the greater weight being given to the application of the privilege. The cases were resolved in favor of the privilege where a substantial likelihood of incrimination could be shown. An analysis of the self-reporting cases supports these generalizations.

This Court has recognized that fundamental conflicts may arise between the Fifth Amendment privilege and the governmental interest in obtaining information. As it stated in

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[23]*See* note 5, *supra* at 7 n.6.

California v. Byers, 402 U.S. 424, 427 (1971):

> Tension between the State's demand for disclosure and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of a balancing of the public need on one hand and the individual's claim to constitutional protections on the other; neither interest can be treated lightly.

In balancing these two interests in *Byers,* the Court looked primarily at two factors: 1) the likelihood that compliance with the self-reporting requirement would incriminate the person submitting the report, and 2) the importance of the required information to the government's effective pursuit of its nonpunitive objectives. The following examples illustrate the apparent balance which the Court has achieved by an application of these two considerations.

When the Court has found that the information required by the self-reporting provision involved a low possibility of incrimination of the individual, and the government's need to collect and use the information was substantial, the Court has generally refused to permit the application of the privilege. *See California v. Byers,* 402 U.S. 424 (1971). *See generally United States v. Sullivan,* 274 U.S. 259 (1927). (In dicta, in *Sullivan,* the Court indicated that the privilege would probably not apply to information relating to the *amount* of income in light of the government's need for such information in order to collect taxes and the low possibility of incrimination.)

When the Court has found that a substantial risk of incrimination existed, and the government's need for the information was not substantial, the Court has suggested that the invocation of the privilege would probably be permitted. *See generally United States v. Sullivan,* 274 U.S. 259 (1927). (For example, from the facts of *Sullivan,* it could be inferred that the privilege might properly apply with respect to information relating to the *source* of the income since such information would be highly incriminatory and the government did not need that information in assessing an income tax.)

When the Court has found that there was both a high risk of incrimination to the individual and, arguably, a strong governmental need for the information, the Court has resolved the conflict in favor of the privilege. *See generally Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965). (In *Albertson,* the Court found that registration as a communist posed a substantial risk of incrimination, which outweighed a presumably strong governmental need to identify potential subversives in order to control subversive activities.) *See also Marchetti v. United States,* 390 U.S. 39 (1968). (In *Marchetti,* the Court concluded that the payment of the occupational tax on gambling carried a substantial risk of incrimination which outweighed the government's acknowledged need for information regarding the identity of gamblers to permit it to collect occupational taxes from them.) *See also Grosso v. United States,* 390 U.S. 62 (1967).

The Court's resolution of a "true conflict" (equally strong individual and governmental interests) in favor of the application of the privilege against self-incrimination demonstrates a policy of resolving doubts in favor of the application of the privilege wherever it appears likely that individual rights and values protected by the privilege may be substantially threatened, regardless of the governmental interest which might be impaired. This principle is consistent with the traditional liberal interpretation of the Fifth Amendment privilege and the protection of the principles underlying it; namely, the fostering of an accusatorial system of justice and the establishment of a fair balance between individual and government.

B. APPLYING THE BALANCING TEST, THE PRINCIPLE ESTABLISHED BY THE SELF-REPORTING CASES DICTATES THAT THE FIFTH AMENDMENT PRIVILEGE BE RECOGNIZED IN THIS CASE SINCE THE LIKELIHOOD THAT THE §311(b)(6) PENALTY IS PUNITIVE IS SUBSTANTIAL AND THE GOVERNMENTAL INTEREST AT STAKE IS RELATIVELY INSIGNIFICANT.

Even if this Court does not conclude, as the Tenth Circuit Court of Appeals did, that the indicators of congressional intent unquestionably show a punitive purpose, the amici believe that, at the very least, the indicators show a real and substantial likelihood of a punitive intent. In that instance also, the privilege must be applied. A balancing of the competing individual and governmental interests in this case weighs heavily in favor of the Fifth Amendment privilege. At this point in the brief, little more needs to be said to show the offensive nature of the regulatory scheme involved and the threat which it poses both to an accusatorial system of justice and to a fair individual-government balance. What does remain to be said is that the government's interest in the operation of the regulatory scheme, without the restriction of the use immunity fashioned by the Tenth Circuit, is not substantial.

While no one would discount the necessity of the §311(b)(5) report in administering the FWPCA, just as the accident report was important in *California v. Byers, supra,* the imposition of the automatic §311(b)(6) penalty (which was designed specifically to be used in conjunction with the §311(b)(6) report) is much less important than the independently-established criminal penalties on traffic violations which were involved in *California v. Byers, supra.* One of the tests articulated by this Court for determining the substantiality of the government's need to demand certain information and to impose certain penalties is whether "other methods entirely consistent with the constitutional limitations" exist. *Haynes v. United States,* 390 U.S. 85, 89 (1968). The nonpunitive purposes identified for the §311(b)(6) penalty could be accomplished equally well, if not better, by alternative statutory schemes. If Congress intends that industry, and not the public, should be responsible for the costs of cleaning up oil spills for which no responsible entity is identifiable and the costs of administering the FWPCA, an occupational tax could simply be placed on members of that industry and then used to finance the FWPCA. If it is Congress' purpose to collect damages for irremediable injuries to navigable waters, then

such damages, like other damages under the Act,[24] should be collected only from those whom the government can show were at fault in discharging oil into navigable waters and the irremediable injuries for which no one is responsible should be paid for from the general fund. There is no substantial need for the government to use the §311(b)(6) penalty to accomplish either of these purposes.

However, if Congress' purpose is to punish those individuals and companies which discharge oil into navigable waters in order to deter all conduct which may lead to such discharges, whether intentional or entirely innocent, then the government must shoulder the burden of imposing the §311(b)(6) penalty by its own individual efforts regardless of the relative efficiency of making individuals impose the penalty on themselves.

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[24] *See, e.g.,* §§311(f)(1)-(3). Pet. App. at 46a-49a. *See also* 33 U.S.C. §1321(f)(1)-(3) (Supp. 1977).

CONCLUSION

Because the indicators clearly show that Congress' purpose in enacting the §311(b)(6) penalty was punitive and because the threat to the values of the Fifth Amendment privilege posed by the FWPCA's enforcement scheme far outweighs the government's need to accomplish any nonpunitive objective by imposing the §311(b)(6) penalty, the holding of the Tenth Circuit Court of Appeals should be upheld.

Respectfully submitted,

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APPENDIX

Table Comparing Various Courts' Applications of the *Mendoza-Martinez* Factors to the § 311(b)(6) Penalty

Explanation of Appendix

The following table summarizes how the various federal district courts and the Tenth Circuit Court of Appeals have applied the *Mendoza-Martinez* factors to the § 311(b)(6) penalty. With respect to each factor, the analysis is broken down into three stages. The first column, "Application," sets forth each court's answer to the individual question outlined in *Mendoza-Martinez*. The "yes" or "no" answer represents the result of the court's straightforward application of the test to the specific facts of the case.

The second column, "Inference," sets forth each court's perceptions of the significance of its factual conclusions in terms of what each conclusion indicates about the purpose of § 311(b)(6). The inferences are expressed in each court's own terminology to the extent possible.

The third column, "Reasoning," summarizes how each court justified its application and its inference for each factor. The language used by the court which is quoted was, of necessity, often paraphrased or edited.

MENDOZA-MARTINEZ FACTORS ❯	1) Affirmative Disability or Restraint?		
CASE	Application	Inference	Reasoning
**United States v. LeBeouf Bros. Towing Co.*, 377 F. Supp. 558 (E.D. La. 1974) (Fifth Amendment privilege)			
United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D. W. Va. 1975) (due process clause)	Yes	None	Penalty is similar to §204 of the Economic Stabilization Act which was found to impose a restraint in *U.S. v. Futura*, 339 F. Supp. 162 (N.D. Fla. 1972)
United States v. General Motors Corp., 403 F. Supp. 1151 (D. Conn. 1975) (due process clause)	No	not necessarily criminal	Sup. Ct. cases in which this factor indicated a criminal penalty concerned different sanctions.
Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976) (Fifth Amendment privilege)	Yes	"Civil"	Since only a monetary sanction is imposed and it is collected through a civil procedure, the restraint is civil.
Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979) (Fifth Amendment privilege)	No	"little indication"	Monetary penalties do not involve the type of disabilities and restraints which occur in the revocation of a previously granted governmental privilege.
Brief for the United States	No	"Remedial"	*Mendoza-Martinez* intended to include only restraints on personal liberty, not the consequences of monetary assessments. Pocketbook impacts point to remedial intent.

*The Court in this case did not answer the questions individually but rather came up with a first conclusion based on an application

TABLE COMPARING VARIOUS COURTS' APPLICATIONS OF THE MENDOZA-MARTINEZ FACTORS TO THE §311(b)(6) PENALTY

2) Historically Regarded as Punishment?			3) Scienter Requirement?			4) Promotes Retribution and Deterrence?			5) Behavior Already a Crime?			6) Connected to an Alternate Purpose?			7) Excessive Penalty?			Conclusion
Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	Application	Inference	Reasoning	
																		Punitive
Yes	Inconclusive "Civil"	Traditionally a criminal punishment, but the collection of monetary penalties as a civil remedy is widely accepted. Collection of penalty through a distinctly civil procedure implies intent to impose a civil sanction.	No	None	None	Retribution: not answered Deterrence: Yes	"Does not render it criminal"	That discharge should be subject to penalty even though cleanup is not practical indicates a deterrent result. This alone does not render it criminal.	Yes	"not determinative"	The fact that it is criminally punishable is not determinative since Congress may impose both a criminal and a civil sanction for the same act.	Yes	Remedial	Compensation to government for tortious damage to environment, which is to be imposed even though defendant cleans up discharge. Collected as a penalty to cover administrative costs.	No	Civil	Indication of desire to make the penalty civil is supported by the provision that factors relating to the ability to pay and the gravity of the offense are to be considered in computing the penalty.	Test "fails to indicate"
Yes	Inconclusive	Fines are a form of punishment, but are acceptable where they serve a remedial rather than a punitive function. Therefore, question remains as to whether it is remedial or punitive.	No	Remedial	None	Retribution: No Deterrence: Yes	"Does not indicate criminal"	Civil penalties are often used to bring about compliance with regulations of administrative agencies through deterrence.	No direct answer	"ambiguous"	Does not constitute a means of adding additional punishment. Points to the criminal nature of the sanction only where its function is to punish rather than to regulate.	Yes (?)	Civil	Overriding purposes are the elimination of oil spills through deterrence and the collection of revenue to clean up discharge. Punishment is an unavoidable by-product.	No	Civil	Factors to be taken into account in fixing the penalty provide flexibility.	Remedial
Yes	Inconclusive	Fines have long been imposed, but civil penalties are not uncommon in federal law.	No	Remedial	None	Retribution: No (?) Deterrence: Yes	"Does not make it criminal"	Difficult to separate deterrence from a regulatory scheme.	Yes	Inconclusive	Relied expressly on *Eureka Pipeline* and *General Motors*.	"No need for search for some alternative purpose."	Compensatory and remedial	Purpose is to defray costs of administration and cleanup.	No	Civil	Mitigating factors may be taken into account in assessing the penalty, which indicates civil character.	Civil, Remedial
Yes	"little indication"	Monetary penalties have traditionally been applied to both criminal and civil statutes.	To impose: No To assess: Yes	criminal	Factors used in determining amount of penalty indicate scienter req. Even if not, §407 of Rivers and Harbors Act is a criminal penalty and it does not require scienter.	Retribution: Yes Deterrence: Yes	"Penal"	Penalties are based on gravity of violation, degree of culpability, prior record. Good faith and subsequent cleanup of one's own discharge are given no consideration, which indicates a penal nature.	Yes	Criminal	§407 of Rivers and Harbors Act specifically prohibits discharge of refuse into navigable waters. Factual situation in *U.S. v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974) is almost entirely analogous.	No	Non-remedial	Could be compensatory if the factors involved in determining the amount of penalty were reasonably related to the damage to the environment. They are not.	could be	Punitive	Imposition of penalties even where discharge is accidental, non-negligent and non-intentional could be excessive. Large businesses can be unduly penalized even where there is lack of fault.	Criminal
No?	"Remedial"	Relies on *Helvering v. Mitchell*, 303 U.S. 391 (1938)	No	"Tends to establish remedial"	The only pertinent factor is "gravity of the offense," which is not a scienter requirement. This factor considers degrees of care, intent, and the amount discharged.	Retribution: No Deterrence: Yes	"Remedial"	Congress expected §311(b)(6) to serve a deterrent function. Deterrent effect must be in excess of what is reasonably related to remedial purposes to be judged criminal. Statute's aim is to reach the conduct engaged in, rather than the person engaging in it.	Yes	Does not prove criminal intent.	Congress may impose both a criminal and a civil sanction in respect to the same act or omission. To be criminal, Congress must intend the sanction to be additional punishment for the same conduct.	Yes	Remedial	The money is used to defray administrative costs, to compensate for environmental damage and to encourage compliance. These are remedial objectives.	No	Non-punitive	Penalty can be tailored to meet the gravity of the violation. Proper application will not render it excessive. Innocence and cleanup efforts do not erase environmental effects.	Civil

of the *Mendoza-Martinez* factors.